MISSISSIPPI LAW JOURNAL

DEDICATION TO THE MEMORY OF
L.Q.C. LAMAR

L.Q.C. LAMAR 1825-1893
Michael H. Hoffheimer

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PART I
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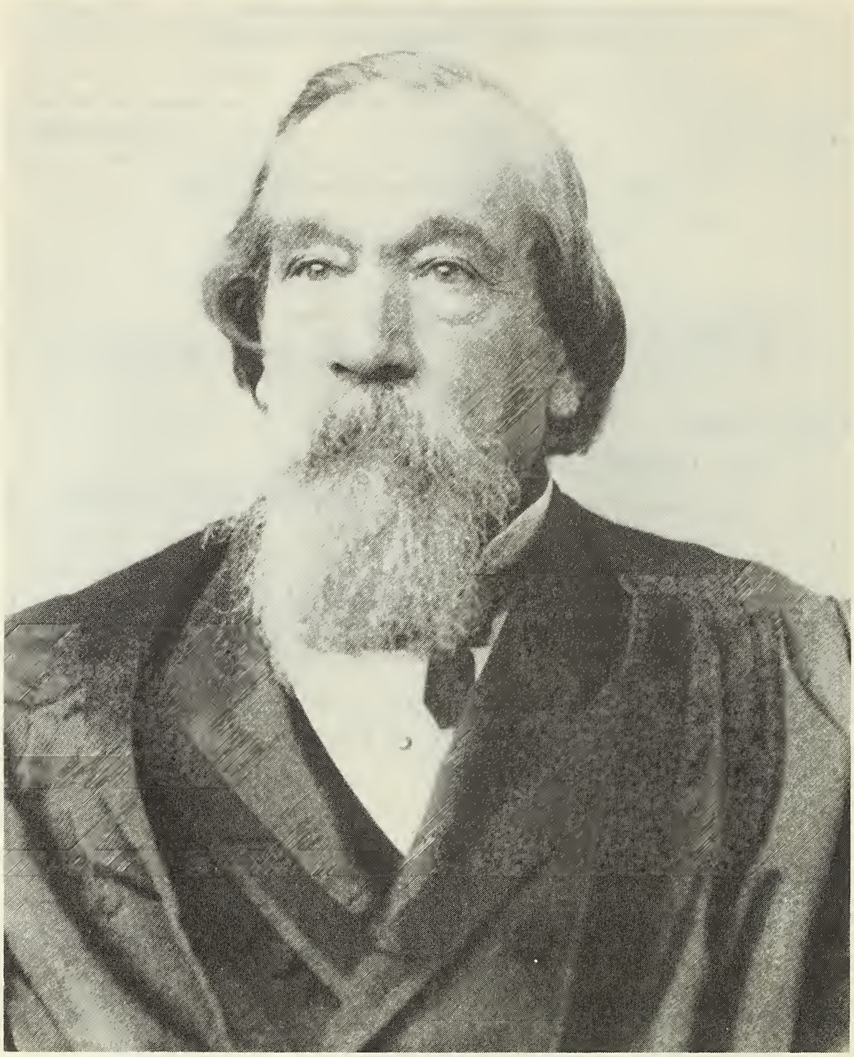

Lamar in 1890
Portrait photograph by Napoleon Sarony
Library of Congress

DEDICATION

The editors of the *Mississippi Law Journal* dedicate this issue specially to the memory of L.Q.C. Lamar on the occasion of the centennial of his death. The publication complements other events at the law school that celebrate Lamar's historic contributions to the legal, political, and cultural life of his country, his state, and his school.

Lamar's image and name are familiar to generations of Mississippi law students, for his portrait hangs in the entrance to the law school building that bears his name. But the passage of time threatens slowly to dim the memory of the positive—and negative—events that elevated the one-time professor of law to the summit of national power.

Indeed, scholars themselves in recent years have avoided this great and controversial figure, so it is fitting to recall without rancor the facts to his career. And it is fitting that Lamar—the scholar who read from Hegel on the floor of Congress—led a life that fell into three dialectical stages.

First, Lamar rose to national prominence as a fire-eating proponent of black slavery—a bellicose champion of secession and the rights of slaveholders to their slaves. And yet on the very eve of battle, Lamar's breakdowns prevented him from killing in that cause for which he was willing to die.

Second, Lamar retreated from public attention and worked quietly as a law professor and lawyer to restore law and learning to his troubled region.

Third, Lamar exploded on the national scene as eloquent spokesman for national reconciliation. Refusing escape through martydom or emigration, he embraced without remorse the new conditions of federal sovereignty and spent the rest of his life in public service as Congressman, Senator, Secretary of the Interior, and Associate Justice of the Supreme Court.

Lamar displayed courage repeatedly in his struggle for reconciliation. He refused to abandon Jefferson Davis after the war. He invoked the ire of constituents in supporting a pension for General Grant. Though he depended on his salary, Lamar nevertheless refused to follow demands of the state legislature and cast his vote with a small, Republican minority against an inflationary bill. In Congress and on the Supreme Court, he protested the shameful fleecing of the Mormons.

In celebrating Lamar's life, we recall, too, his great failings—above all his silence during the disenfranchisement of blacks. Yet we recall also how in his day he displayed real courage in denouncing the Ku Klux Klan and in accepting, in theory, the legal right of blacks to vote and in making support of education—for blacks and whites—a legislative priority.

No single achievement of Lamar and no single stage in his political career can account fully for his appeal to posterity. History is replete with saints and scholars who adhered more tenaciously to the absolute and who achieved works of greater enduring value. It is rarer, perhaps, to discover the defeated enthusiast who, struggling to retain his or her convictions, works with former enemies to build a peace that preserves, under law, the honor and principles of both victor and vanquished.

Lamar's life may speak to the present age where the shattering of old alliances and the kindling of old hatreds inspire anew the ancient search for reconciliation. Lamar's age and its passing evoke Kipling's reflections at the end of the first world war:

For agony and spoil
    Of nations beat to dust,
For poisoned air and tortured soil
    And cold commanded lust,
And every secret woe
    The shuddering waters saw—
Willed and fulfilled by high and low—
    Let them relearn the Law:

***

That neither schools nor priests,
Nor Kings may build again
A people with the hearts of beasts
Made wise concerning men.
Whereby our dead may sleep
In honour, unbetrayed,
And we in faith and honour keep
That peace for which they paid.[1]

So, too, in marking Lamar's death, we remember his life's lesson that peace is something greater than absence of war; that peace is not made by friends; and that the condition for peace is not annihilation but honor, tolerance, and respect sealed by Law.

Michael H. Hoffheimer

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[1] RUDYARD KIPLING, *Justice*, *in* RUDYARD KIPLING'S VERSE 391-92 (Definitive ed. 1940).

L.Q.C. LAMAR 1825-1893

Michael H. Hoffheimer[*]

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I. INTRODUCTION: THE LEGACY OF L.Q.C. LAMAR

A. *Years of Turmoil and Wandering (1835-1865)*

Lucius Quintus Cincinnatus Lamar was one of eight historical figures featured in President Kennedy's book *Profiles in Courage*.[1] The chapter on Lamar concluded with the judgment:

> At no time did he [Lamar], who has properly been termed the most gifted statesman given by the South to the nation from the close of the Civil War to the turn of the century, ever veer from the deep conviction he had expressed while under bitter attack in 1878: "The liberty of this country and its great interests will never be secure if its public men become mere menials to do the biddings of their constituents instead of being representatives in the true sense of the word, looking to the lasting prosperity and future interests of the whole country."[2]

The facts of Lamar's career firmly establish his place among the most accomplished and influential political figures that Mississippi has contributed to the life of the region and country.[3] Born September 17, 1825, the eldest son of Lucius

---

[1] JOHN F. KENNEDY, PROFILES IN COURAGE 172-97 (1964). Kennedy surveyed Lamar's life but focused on his activity in Congress after the war, especially his eulogy in the House on the great abolitionist Senator from Massachusetts Charles Sumner, his support for the Congressional Electoral Commission that awarded the deputed votes and the presidency to Hayes over Tilden, and his opposition in the Senate to the Bland silver-standard currency bill. *Id.* at 172-75, 183-93.

[2] *Id.* at 197.

[3] A study of the history of Lamar's posthumous reputation would illuminate the politics of regional history. Despite Kennedy's tribute to Lamar, and notwithstanding the fact that he was the subject of several laudatory biographies before World War II, both popular and scholarly interest in Lamar declined steadily during the century after his death. He has been almost entirely neglected by New South historians. *See infra* note 54 and accompanying text. The 100th anniversary of his death passed with no acknowledgement other than the anonymous appearance of flowers on his grave in Oxford and the republication of a short notice in the Memphis paper from a century before. *See Bygone Days*, THE COM. APPEAL (Memphis), Feb. 4, 1993, at C6 ("100 Years Ago . . . There will be held this morning in the United States Courtroom a public meeting, to which all good citizens are invited, to take action on resolutions prepared by a committee of the Bar Association regarding the death of the late Associate Justice

Q.C. Lamar and Sarah Williamson Bird (or Byrd), Lamar grew up in a family of lawyers and statesmen. One of Lamar's mother's sisters married Governor John Clarke of Georgia, and another sister was the mother of United States Supreme Court Justice John A. Campbell. His father's brother, Mirabeau B. Lamar, migrated to Texas in 1835, served as president of Texas, and later was appointed United States minister to several foreign countries.[4]

Lamar's father distinguished himself as a legal authority. He edited and compiled the authorized text of Georgia legislation[5] and was appointed state judge.[6] Sadly, his father suffered from severe and recurring bouts of depression, which crippled his career, and he killed himself when Lamar was nine years old. After the suicide, Lamar's mother assumed primary care for raising the family. She enrolled Lamar in the Methodist Manual-Labor School, which merged with Emory College in

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L.Q.C. Lamar.").

[4] The facts of Lamar's life are recorded in his biographies. *See* WIRT A. CATE, LUCIUS Q.C. LAMAR: SECESSION AND REUNION (1935); EDWARD MAYES, LUCIUS Q.C. LAMAR: HIS LIFE, TIMES, AND SPEECHES 1825-1893 (2d ed. 1896); JAMES B. MURPHY, L.Q.C. LAMAR: PRAGMATIC PATRIOT (1973). Mayes married Lamar's daughter Fanny, and Cate aptly described Mayes's biography as "a sympathetic and altogether admirable work, written at the request of the immediate family of Lamar, and growing out of long years of intimate association with him." CATE, *supra*, at viii-ix. Cate, in turn, relied heavily on Mayes and depicted Lamar as a representative of the New South who reluctantly conceded defeat, resisted reconstruction, and championed the interests of the section after the war. Cate's praise for Lamar was unbounded, and he even attributed the Frontier Hypothesis "popularized by Professor Frederick J. Turner" to Lamar. *Id.* at viii. Murphy's biography benefitted from the author's greater distance from his subject, though Murphy, too, relied on Mayes for some sources. Unlike Mayes and Cate, Murphy did not undertake a comprehensive description of the main speeches and political events in Lamar's life; rather Murphy combined a more selective narrative account with greater attention to Lamar's motives and his emotional and psychological life. Biographical data can also be found in numerous general references and articles. *See, e.g.*, DUNBAR ROWLAND, COURTS, JUDGES, AND LAWYERS OF MISSISSIPPI 1789-1935 128-50 (1935).

[5] A COMPILATION OF THE LAWS OF THE STATE OF GEORGIA, PASSED BY THE LEGISLATURE SINCE THE YEAR 1810 TO THE YEAR 1819, INCLUSIVE (Lucius Q.C. Lamar ed. 1821).

[6] MURPHY, *supra* note 4, at 6. Murphy points out that the appointment to the circuit court was the highest ranking judicial position because the state system had no supreme appellate court. *Id.*

1840. Lamar graduated from Emory in 1845 and pursued a legal education in the law office of a relative in Macon, Georgia. Lamar was successful enough in his first years in practice so that by 1847 he could marry Virginia Longstreet, daughter of Judge Augustus Baldwin Longstreet, the President of Emory College. Lamar's wife was to exert a profound influence on him throughout his life, and his connection through her to Longstreet shaped his career. In 1859 he wrote her, "I am indebted to you for ennobling influences from my boyhood up to middle age."[7] His letters to her confess some of his deepest feelings, which he expressed to few others, and move easily from expressions of tender love to topical news, to family business. A letter he wrote her before the war is representative:[8]

> Washington DC.
> December 20, 1858
>
> My dearest wife
>
> I have nothing to write about this morning, for yesterday was Sunday & that day is one usually destitute of incident. I regret to say this, for I would be glad to lay before you the record of holy thoughts and fervent aspirations & prayer. I want to be a Christian, but I fear that as long as I am in public life, my mind will be too much bound up in the affairs of this world. I had a long talk with Mrs Clay last night. She wants to see you very much & so does Mrs Sandidge & Mrs Fitzpatrick.
>
> I received a letter yesterday from Sister Fanny. She reports all well.
>
> I have no news from home. Miss Sue Sparrow is in the City and wishes to see me. I am suffering from a severe toothache, and cannot write much. It is difficult, too, to write when I don't get a letter from you; and I am without a letter this morning. My darling children kiss them for me. I told you yesterday morning, that I would probably start next Tuesday for Columbia. I am a week too soon it will be next

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[7] CATE, *supra* note 4, at 30.

[8] Letter from L.Q.C. Lamar to Virginia Lamar (December 20, 1858), *in* LAMAR FAMILY PAPERS, (on file with the University of Mississippi School of Law).

> week that I shall be able to start. I have a $500 draft for your Pa which I will send to-day or to-morrow.
>
> Your loving & devoted
> Lucius

During her last years, Lamar's wife suffered from recurring illness that limited her mobility and required her separation from Lamar while he was in Washington.[9]

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[9] The Lamar family letters recently presented to the University of Mississippi School of Law by Mrs. Lois Heiskell, Mrs. Ruth McCall Heiskell Summers, and Ms. Lee Winchester Summers shed light on Lamar's relation with his wife in the last decade of his life. From at least the late 1870's she suffered from persistent ailments, the symptoms of which included chills, which limited her mobility. *See, e.g.*, Letter from L.Q.C. Lamar to Virginia Lamar (July 29, 1880), in LAMAR FAMILY PAPERS, *supra* note 8 ("delighted to learn that you are so much better"); Letter from L.Q.C. Lamar to Virginia Lamar (August 24, 1880), *in* LAMAR FAMILY PAPERS, *supra* note 8 ("it will not do for you to return to Oxford. . . . I wish you could get well."). Murphy concluded that she suffered lung disease. MURPHY, *supra* note 4, at 245. Lamar discouraged her from coming to Washington: "You know my dear sweet Jeannie I would rather have you with me than anything in the world. But the cold here is just terrible. The houses [unclear] as they are built are so cold that they are putting extra stoves in them. The signal service reports Washington as the coldest place in the U.S." Letter from L.Q.C. Lamar to Virginia Lamar (January 2, 1881), *in* LAMAR FAMILY PAPERS, *supra* note 8. At the same time, he longed to be with her. On January 19, 1881, he wrote, "My precious wife, Dear darling, I wish I could be with you, and if you would feel more contented to have me come to you I would fly to you as fast as steam & love could carry me." Letter from L.Q.C. Lamar to Virginia Lamar (January 19, 1881), *in* LAMAR FAMILY PAPERS, *supra* note 8.

In the fall of 1881 Lamar's wife was in good enough health that he entrusted her with details of the farming while he went campaigning. Letters from L.Q.C. Lamar to Virginia Lamar (September 23, 1881, October 9, 1881, and October 23, 1881), *in* LAMAR FAMILY PAPERS, *supra* note 8. But by September 22, 1883, she was again ill, living with her daughter in Memphis. Letter from L.Q.C. Lamar to Virginia Lamar (September 22, 1883), *in* LAMAR FAMILY PAPERS, *supra* note 8. She returned to Memphis bedridden the next year. Letter from L.Q.C. Lamar to Augusta Lamar Heiskell (May 6, 1884), *in* LAMAR FAMILY PAPERS, *supra* note 8.

Lamar's wife's invalid status helps to explain why he must have greeted her death on December 29 or 30, 1884, with grief tempered by a sense of relief. Cate observed that "[w]hen she died . . . a vacancy came that could never be filled." CATE, *supra* note 4, at 31. Murphy wrote that "[t]he blow was devastating." MURPHY, *supra* note 4, at 245. Lamar's mourning was brief, however, for in a letter to General Beale dated February 26, 1885, Lamar did not mention his wife's death among his excuses for declining an invitation. Letter from L.Q.C. Lamar to General Beal (Feb. 26, 1885), *in* LAMAR FAMILY PAPERS, *supra* note 8. In April 1886, Lamar proposed marriage to Mrs. H.D. Holt, who initially refused. *See* Letter from L.Q.C. Lamar to Augusta Lamar Heiskell (April 25, 1886), *in* LAMAR FAMILY PAPERS, *supra* note 8; Letter from L.Q.C.

Judge Longstreet was called to serve as president of the new University of Mississippi in 1849, and Lamar followed him to Oxford with his young family the next year. Lamar combined legal practice with a position as Assistant Professor of Mathematics[10] and immediately entered state politics as a champion of the most extreme "states' rights" reaction against the growing national anti-slavery movement.[11]

For a brief time Lamar returned to Georgia where he was elected to the state legislature for 1853-54. But he returned to Mississippi for good in 1855.[12] With the financial help of Longstreet, Lamar established a plantation of almost 1000 acres north of Oxford and ranked among the planter elite, owning as many as twenty-six slaves.[13] The plantation did not prosper, and he also practiced law in Holly Springs.

With the aggravation of the national conflict between pro- and anti-slavery forces, Lamar's more extreme "states' rights" politics gained support among the political elite in the slave states. He ran as Democratic candidate for Congress and was elected in 1857 and reelected (unopposed) in 1859. He served

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Lamar to Mary Ann Ross (Lamar's sister) ([April?] 28, 1886), *in* LAMAR FAMILY PAPERS, *supra* note 8. The two were married in January 1887. MAYES, *supra* note 4, at 507.

[10] His salary was $800 and half the student fees he collected. MURPHY, *supra* note 4, at 15. But perhaps this was salary for half-year, because Mayes records that faculty salaries were fixed at "$1500, with the perquisites arising from tuition fees." EDWARD MAYES, HISTORY OF EDUCATION IN MISSISSIPPI 136 (U.S. Bureau of Information Circular no. 2, 1899) [hereinafter cited as HISTORY OF EDUCATION IN MISSISSIPPI]. For Lamar's appointment, see *id.* at 141.

[11] *See* MURPHY, *supra* note 4, at 15-16; MAYES, *supra* note 4, at 51-55.

[12] His biographers recount his experiences in Georgia. *See* CATE, *supra* note 4, at 41-46; MAYES, *supra* note 4, at 56-59; MURPHY, *supra* note 4, at 23-29.

[13] *See* MURPHY, *supra* note 4, at 30-31. Mayes later recalled life on the plantation in romantic, paternalistic, racist terms. MAYES, *supra* note 4, at 60. But Murphy speculates that, because the plantation was located in an undeveloped part of the state, much of the early work must have been devoted to clearing the land and construction. MURPHY, *supra* note 4, at 30-31. Murphy locates the plantation twelve miles north of Oxford on the Tallahatchie River, MURPHY, *supra* note 4, at 30-31, but that places it near the town of Wyatt, the oldest settled community in Lafayette County. *See* ROBERT LOWRY & WILLIAM H. MCCARDLE, A HISTORY OF MISSISSIPPI, FROM THE DISCOVERY OF THE GREAT RIVER BY HERNANDO DESOTO, INCLUDING THE EARLIEST SETTLEMENT MADE BY THE FRENCH, UNDER IBERVILLE, TO THE DEATH OF JEFFERSON DAVIS 511 (1891). In any event Lamar's involvement with the plantation after 1857 was "only nominal." MURPHY, *supra* note 4, at 30.

as an ardent advocate of slave-state interests until the attempted secession of Mississippi in 1861. He defiantly elevated sectional interests above the national good.

> Others may boast of their . . . comprehensive love of this Union. With me, I confess that the promotion of Southern interests is second in importance only to the preservation of Southern honor.[14]

With the election of Lincoln, Lamar promoted the secession of Mississippi and the formation of a "Southern Republic" in order to preserve slavery from any attack.[15] In early 1861 he attended the Mississippi secession convention and organized a committee to draft a secession ordinance.[16] He drafted and

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[14] L.Q.C. Lamar, Initial Speech to the House of Representatives, *quoted in* MURPHY, *supra* note 4, at 38. Lamar epitomized the most aggressive, expansionist approach to slaveholder interests, which made the military impasse a virtual certainty. *E.g.*, L.Q.C. Lamar, Speech in the House of Representatives (January 13, 1858), *in* MAYES, *supra* note 4, at 609 ("If I could do so consistently with the honor of my country, I would plant American liberty, with Southern institutions, upon every inch of American soil. I believe that they give to us the highest type of civilization known to modern times . . . ."); L.Q.C. Lamar, Speech in the House of Representatives (February 21, 1860), *in* MAYES, *supra* note 4, at 629 ("[W]hen these two races are brought into contact, the supremacy of the white man must be acknowledged, and his right to govern both races with reference to the happiness of both").

[15] The issues that required secession were not the rights of states in the abstract, for he *always* envisaged the participation of Mississippi in a larger multistate sovereign. Rather he insisted either that the United States amend the Constitution to prevent the elimination of slavery or that a new "Southern Republic" be formed for that purpose. *See* Letter from L.Q.C. Lamar to James Longstreet (November 13, 1860), *in* MAYES, *supra* note 4, at 86; Letter from L.Q.C. Lamar to P.F. Liddell (December 10, 1860), *in* MAYES, *supra* note 4, at 633-39.

[16] For the text of the Ordinance of Secession, *see* LOWRY & MCCARDLE, *supra* note 13, at 342-43. The ordinance was a model for the legal posture that the rebel state would assume with respect to previous federal law. Its first section purported to "repeal" all laws "by which the said State of Mississippi became a member of the Federal Union." The second section declared "abrogated" the provision of the state constitution that required state officers to take oaths to support the Constitution. The third section declared the continuing validity of all federal law "not incompatible with this Ordinance." And the fourth section declared: "That the people of the State of Mississippi hereby consent to form a Federal Union with such of the States as may have seceded, or may secede from the Union of the United States of America, upon the basis of the present Constitution of the said United States, except parts thereof as embrace other portions than such seceding States [sic]." *Id.* at 343.

True to the conviction of its founders, the Confederate States fundamental law closely tracked the United States Constitution. It limited state sovereignty by including presented the ordinance to the convention, which approved it by a vote of eighty-four to fifteen, after supporters defeated efforts to submit the matter to popular vote.[17]

In 1860 Lamar had already announced his intention to leave politics and had accepted the Professorship of Mental and Moral Philosophy at the University of Mississippi.[18] As war approached in 1861, almost all the students left for the military; the university was forced to close,[19] and Lamar, too, left to join the fight.

Just before his first military action, Lamar suffered a disabling paralysis. The reoccurrence of paralyses and other disabling symptoms in connection with particularly stressful experiences throughout Lamar's life make it likely that the illnesses resulted from a hysterical neurosis or conversion disorder.[20] It is important to stress that the symptoms result-

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the Supremacy Clause, Constitution of the Confederate States of America 1861, article VI, section 3. The Confederate constitution copied verbatim from the United States Constitution, article VI, paragraph 2, except that it substituted the word "Confederate" for "United." Though the Confederate constitution duplicated federal law with respect to prohibitions of international slave trade, it preserved the rights of slave owners throughout its constituent states *regardless* of state law, and in any territory acquired by the confederacy. *Compare* U.S. CONST. art. X *with* CONST. OF THE CONFEDERATE STATES OF AMERICA, art. I, § 9(1)-(2); art IV, § 2(1); art. IV, § 3(3).

[17] MURPHY, *supra* note 4, at 59.

[18] One biographer presents Lamar's retirement as a sudden decision. MURPHY, *supra* note 4, at 53. But Lamar had debated whether to run for re-election and had been considering withdrawing from national politics as early as 1858. *See* MAYES, *supra* note 4, at 76-77.

[19] Lamar did not encourage students to join the military in early 1861, and he helped organize a different military unit, the 19th Mississippi Regiment, in which he was second in command. *See* MURPHY, *supra* note 4, at 62.

[20] "Before the regiment left Richmond, Col. Lamar had the first attack of a physical infirmity, which pursued him during the whole of his after life, which hung over him always, a veritable sword of Damocles. It was a violent vertigo, something like an apoplexy, accompanied by unconsciousness more or less prolonged, and followed by more or less of paralysis of one side. Sometimes even his speech was affected." MAYES, *supra* note 4, at 96.

Murphy suggests a diagnosis of "rupture or occlusion of an intracerebral artery" (which is a fancier way of saying "apoplexy"). MURPHY, *supra* note 4, at 65. But the surviving biographical evidence strongly suggests a nonorganic etiology. Lamar's childhood trauma left deep traces, and his contemporaries and biographers refer repeatedly to Lamar's life-long struggles with depression and feelings of inadequacy. He had earned the nickname "Moody Lamar" in Washington before the war. *See* ing from a psychiatric or somataform illness of this kind would be just as real as those caused by a mechanical disturbance, and in either event Lamar had no conscious control over them. The presence of a conversion disorder may be of biographical significance. On the one hand, Lamar's powerful and unconscious antipathy to conflict that manifested itself as illness also provided a deep ground for his conscious political concern after the war with reconciliation and conflict avoidance. The depth of his antipathy to conflict also helps explain the extraordinary power of will—and courage—that he displayed on several important occasions where he voluntarily entered conflict—whether in the form of combat during the war or in taking unpopular political stands after the war. On the other hand, Lamar's powerful need to avoid conflict may have provided a mechanism behind the blind eye that he turned towards the greatest potential conflict after the war, the plight of blacks in the South.[21]

After a period of recovery, Lamar returned to the front and helped lead troops at the Battle of Williamsburg in May 1862. The action stalled the United States advance, but Lamar's unit suffered terrible casualties, including Colonel C.H. Mott, his

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MURPHY, *supra* note 4, at 37 (quoting CLEMENT C. CLAY, A BELLE OF THE FIFTIES 48 (1889)).

Though a differential diagnosis is impossible, Lamar exhibited all the distinctive symptoms of conversion disorder, including paralysis and vertigo, also known as coordination disturbance. Moreover, these symptoms occurred repeatedly in the context of a specific mechanism—avoidance of conflict situations. The course of his illness, age of onset, and predisposing factors further support a diagnosis of conversion disorder. *See generally* COMMITTEE ON NOMENCLATURE & STATISTICS, AMERICAN PSYCHIATRIC ASSOC., DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 241, 244-47 (3d ed. 1980).

The mechanism operated most graphically to produce paralysis on two occasions that prevented him from engaging in combat. Moreover, his letters many years later are full of complaints of physical illnesses with specific disabilities that interfered with his writing, speaking, and other political duties that were charged with conflict.

[21] *See infra* notes 61-64 and accompanying text. One can only speculate about the underlying causes of the mechanism. One former slave observed that slave owners frequently suffered a variety of pains and disabilities. FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 111-12 (1855).

friend and co-leader of the regiment.[22] On the eve of his next engagement, Lamar suffered another sudden attack of his illness, ending his military career. At about the same time, federal troops moved into and occupied Lamar's home state. After a brief term on the military court at Richmond, Lamar was appointed commissioner to Russia. He never reached Russia.[23] After a circuitous trip home, Lamar returned to work for Jefferson Davis and the Confederate War Department in Richmond.[24] Ill health kept him in Georgia in 1864.[25] He served briefly again as judge advocate, which his son-in-law recalled him detesting as "the most unpleasant duty I ever had to perform in my life."[26] He was present at Lee's surrender at Appomattox Courthouse, was paroled and released with a letter of introduction and safe conduct from E.B. Washburne to his brother, Major General Washburne, in Memphis.[27]

Edward Mayes later characterized the benefits of the war as worth its terrible costs to his country and region. He wrote that "the losses and sufferings endured were not an extravagant price to pay for . . . the assurance of an indestructible Union . . . [and] the extirpation of the deplorable cancer of slavery."[28] But it is doubtful whether Lamar could share such equanimity at the war's end. He had collapsed several times from the stresses of war. He had lost both his brothers in battle—his younger brother Jefferson, a lieutenant colonel, died in September 1862 from wounds received in action, and his older brother Thompson, a colonel, fell in battle in 1864.[29] He had lost law partners, cousins, and untold friends and comrades.

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[22] MAYES, *supra* note 4, at 99-101; CATE, *supra* note 4, at 87-88; MURPHY, *supra* note 4, at 67.

[23] The saga of his trip and reasons for postponing the journey to Russia are recounted in the biographies. MAYES, *supra* note 4, at 103-14; MURPHY, *supra* note 4, at 69-73. The Confederate Senate ultimately in mid-1863 refused to confirm his nomination as Ambassador to Russia as part of a general frustration with the failures of overtures to Europe. *See* MAYES, *supra* note 4, at 109; MURPHY, *supra* note 4, at 76.

[24] MURPHY, *supra* note 4, at 81-82.

[25] MAYES, *supra* note 4, at 114.

[26] *Id.* at 115.

[27] For the text of the letter, see MAYES, *supra* note 4, at 115-16.

[28] *Id.* at 117.

The war and defeat were sobering experiences, and one can only speculate about their impact on Lamar's inner life. Despite a formal religious education, Lamar had not joined any church in the 1850's.[30] During the war he increasingly sought solace in religion, and he joined the Methodist Church in 1862.[31]

B. Statesman Redux (1865-1888)

Immediately after the war Lamar practiced law briefly in Coffeeville, south of Oxford. But this practice was soon terminated by ill health.[32] In the fall of 1866 he returned to the University of Mississippi fulltime as Professor of Ethics and Metaphysics.[33] In January 1867 he was made Professor of Governmental Science and Law.[34]

The law school, as the only professional school at the University until 1903, enjoyed administrative autonomy.[35]

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[29] *Id.* at 101-02, 114-15.

[30] *Id.* at 56.

[31] *Id.* at 559; MURPHY, *supra* note 4, at 82.

[32] MURPHY, *supra* note 4, at 88.

[33] He received $2000 salary in addition to any tuition payments of $50 per student that he collected, but he frequently waived tuition for needy students. *See* JAMES ALLEN CABANISS, A HISTORY OF THE UNIVERSITY OF MISSISSIPPI 74 (1949); Daniel J. Meador, *Lamar and the Law at the University of Mississippi*, 34 MISS. L.J. 227, 237 (1963).

[34] Lamar first offered classes on Logic and Mental and Moral Philosophy. He also assumed responsibility for law instruction when the designated law instructor failed to appear. He was formally appointed Professor of Governmental Science and Law in January 1867 and relinquished the professorship of Ethics and Metaphysics. Meador, *supra* note 33, at 231-32.

[35] The University was reorganized in 1871 after the model of the University of Michigan, which the Chancellor had visited in 1871. It comprised three departments: 1) a preparatory or high school; 2) a department of science, literature, and the arts (which included six separate courses of study leading to the B.A., B.S., Bachelor of Philosophy, Civil Engineer, M.A., and Ph.D. degrees); and 3) professional education. The third department was intended from its start to include a law school and a medical school, but a medical school was not added until 1903. *See* HISTORICAL CATALOGUE OF THE UNIVERSITY OF MISSISSIPPI 11 (1910); CABANISS, *supra* note 33, at 84-85. The law school was not properly a graduate school since a B.A. was not required for admission or a prerequisite for receipt of a Bachelor of Laws degree. It was probably common,

From its founding, the law school had emphasized the need to link the study of law with philosophy and history.[36] The law school catalogs stressed the importance of studying law as a profession in a law school as opposed to learning it as a trade in a law office.[37] As the sole instructor of the law school, Lamar implemented a rigorous two-year course of study centered on Blackstone, Story, Kent and other treatises.[38] He required class participation; he introduced moot courts, which he judged; and he concluded the academic year with a searching, public oral examination.[39] Over four years, thirty-eight of his fifty-four students graduated and qualified for practice in the state.[40] His students included Edward Mayes; Mayes married Lamar's daughter while still his student; later prac-

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however, for students to receive a B.A. a year or two before the law degree, as was the case with Mayes. *Id.* at 110. Although the Ph.D. was listed in catalogs as early as 1870, only three such degrees were awarded (in 1893, 1894, and 1895) before 1948, not counting an honorary degree awarded in 1877. *Id.* at 85.

[36] The Report of the Trustees to the legislature urging the need for a professor of law argued: "The University greatly needs a professorship of law. But not of law alone, in the opinion of the undersigned. The Philosophy of Government should be taught together with it, and history, which is philosophy teaching by example." Minutes of the Board of Trustees (January 12, 1854), *quoted in* CABANISS, *supra* note 33, at 232. For the history of the law school, see generally HISTORY OF EDUCATION IN MISSISSIPPI, *supra* note 10, at 142-46.

[37] CABANISS, *supra* note 33, at 239.

[38] The central role of treatises is evident from the reading lists and from student recollections. *See* Meador, *supra* note 33, at 235, 239-40.

[39] *See* HISTORY OF EDUCATION IN MISSISSIPPI, *supra* note 10, at 145; Meador, *supra* note 33, at 240; MAYES, *supra* note 4, at 125. Mayes had first hand knowledge of Lamar as a teacher.

None of the sources identify the site of the law school during Lamar's tenure. One oral tradition places the law school in the old Geology Building (Ventress), but that building was constructed under Mayes's administration after Lamar's departure. *See* CABANISS, *supra* note 33, at 107.

In the mid-1870's the Lyceum was still the only campus building with lecture halls. CABANISS, *supra* note 33, at 92. Thus it is most likely that Lamar taught at the Lyceum. There is a possibility, however, that some law instruction still occurred off campus, as it had immediately prior to the Civil War. Meador, *supra* note 33, at 234. With enrollment ranging from 19 to 26 students, Lamar might have offered instruction at his house.

[40] Meador, *supra* note 33, at 236-37. The diploma privilege had been adopted in 1857. *Id.* at 233; HISTORICAL CATALOGUE OF THE UNIVERSITY OF MISSISSIPPI, *supra* note 35, at 61.

ticed law with Lamar; and still later served as law professor and Chancellor of the University.[41] Judicial appointments of law professors have become common in the twentieth century, but Professor Meador points out that "Lamar was the first, and the only one before this century, to have served as a full-time University law professor before appointment to the [Supreme] Court."[42]

In 1868 Lamar also began an active legal practice in Oxford and resumed political activity.[43] By 1869 he was sufficiently solvent to purchase thirty acres of land near the center of Oxford and to construct an ample six-room frame house, which still stands.[44] After the gubernatorial election of 1870, the new Republican governor appointed a new board of trustees for the University, and Lamar resigned for political reasons.[45]

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[41] Meador, *supra* note 33, at 238-39.

[42] *Id.* at 227.

[43] Meador observes that Lamar attended faculty meetings "only sporadically," especially in 1868-69 "when he was resuming law practice and other activities." *Id.* at 245. Meador observes that Lamar did not engage "in any substantial political activity" during his four years of teaching at the law school. *Id.* at 246; *see* MURPHY, *supra* note 4, at 91-92.

Murphy raises the question of whether Lamar participated in clandestine illegal activities in resistance to Reconstruction. MURPHY, *supra* note 4, at 96. Lamar openly expressed his political opposition to Reconstruction, but absolutely no evidence supports an inference that he supported terrorism. The incident where he attacked a federal marshal does not support such speculation. *See* Daniel J. Meador, *Lamar to the Court: Last Step to National Reunion*, SUP. CT. HIST. SOC'Y Y.B. 22, 34-35 (1986). Moreover, such activity would be inconsistent with his later, recorded denunciation of the Ku Klux Klan.

Lamar's public criticism of Klan terrorism was occasionally viewed with suspicion by northern critics, and his denial of any interference with the voting rights of blacks lacked credibility. *See* MURPHY, *supra* note 4, at 201-03. But Lamar denounced the Klan in his home state during the campaign of 1881, which Murphy identified as the most intense period of Lamar's appeal to white prejudice. *See* MURPHY, *supra* note 4, at 229-30. In an 1881 speech at Hazlehurst "[h]e denounced Kukluxism and ballot box frauds, and was opposed to bulldozing and violence of every character, and believed that there was a peaceable way to adjust all grievances without resorting to unlawful expedients." MAYES, *supra* note 4, at 443 (quoting *New Orleans Democrat*).

[44] MAYES, *supra* note 4, at 126, 166; MURPHY, *supra* note 4, at 92 & n.30.

[45] HISTORY OF EDUCATION IN MISSISSIPPI, *supra* note 10, at 164; MURPHY, *supra* note 4, at 98. Lamar was also increasingly occupied with his legal practice, and there is evidence that he was contemplating opening a new law school in Georgia. *Id.* at 93, 99.

Lamar's Oxford Home
Spring 1993
Photograph by Richard L. Barnes

In 1872 Lamar resumed his national political career. He was elected to Congress by a two to one majority.[46] The House and Senate acted quickly to remove his disability with little controversy, and President Grant signed the bill.[47]

Lamar's first major speech in Congress was his eulogy on Charles Sumner, the abolitionist Senator from Massachusetts.[48] Lamar's plea for an end to sectional hatred stunned the audience and electrified the nation. The speech quickly earned Lamar national reputation as the Southern spokesman for reconciliation and reunion.

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[46] He lost the popular vote in Lafayette County. *See* MURPHY, *supra* note 4, at 109.

[47] U.S. CONST. amend. XIV, § 3 ("No person shall be a . . . Representative in Congress . . . who, having previously taken an oath, as a member of Congress . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same . . . . But Congress may by a vote of two-thirds of each House, remove such disability."); *see* MURPHY, *supra* note 4, at 110.

[48] L.Q.C. Lamar, Speech on Charles Sumner (April 27, 1874), *in* 43d Cong., 1st Sess., 6 CONG. REC. 3410-11 (1874).

The political timing and rhetorical brilliance of the eulogy on Sumner have been praised even by his most critical biographers.[49] The speech also proclaimed the two, sometimes inconsistent, themes that motivated much of the rest of his career. On the one hand, he promoted his sectional identity and pleaded for "the impoverished and suffering people of the Southern States"; on the other hand, he stressed the principles that both North and South held in common, "the heroism, fortitude, and courage of Americans in a war of ideas."[50] His plea for mutual understanding and love at the end of the Sumner speech was a plea for acceptance of full southern participation in the reunited country. But it was simultaneously a plea to his constituency for resignation in the defeat of the movement for regional autonomy and for the renunciation of key values associated with the rebellion. For the rest of his political life, Lamar was conscious that with every word he addressed two audiences with two different messages.[51]

Lamar had further opportunities to play his role as the symbol of reconciliation. In 1881 in the Senate he would rise dramatically to support a bill to preserve General Grant's military pension: "[T]he general most eminent in a war which a majority of the American people do, as we all know, regard as sacred in its motives and as important in its consequences as the War of the Revolution, should be secured an honorable competence at the close of [his] long and arduous service."[52] As in the speech on Sumner, Lamar conceded defeat, yet infused the war experience with meaning for all sides by identifying it with enduring values that transcended the politics of either side. He was ever careful to explain that such a broad, conciliatory perspective did not threaten any Southern interest.[53]

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[49] MURPHY, *supra* note 4, at 115-20.

[50] The twin themes are clearly presented in Lamar's writings prior to his election. For example, in his eulogy on Robert E. Lee dated December 5, 1870, he had declared:

> [T]he war has closed; and it is high time that the evil passions which it aroused should be hushed. Would to God that the memories of its outrages and atrocities could be banished forever from the minds of men! And if the victorious North would afford to the defeated people of the South the benefits of the Union and constitution, in whose name the desolations of war were visited upon them, and permit them to enjoy, in the Union, *real union*, concord, amity, and security from oppression, the Southern people would be prompt to bury all the animosities of the war, to remember only its glories, and to regard the glories won by each people as the common property of the American nation.

MAYES, *supra* note 4, at 658.

[51] Lamar suffered great personal stress as even his reticence became charged with political equivocation. Copiah County was the site of riots against black voters. MAYES, *supra* note 4, at 452. Lamar prepared to address the issue in Congress but decided to remain silent. *Id.* He confided to his daughter: "The investigation of the Copiah riot throws a heavy burden upon me. I cannot defend the acts of those people & yet if I condemn them, ungenerous adversaries will take advantage of my admissions. Public life has become a great cross to me." Letter from L.Q.C. Lamar to Augusta Lamar Heiskell (February 29, 1884), *in* LAMAR FAMILY PAPERS, *supra* note 8.

The astonishing neglect of Lamar by New South historians[54] probably derives from a reluctance to confront his race politics. It seems best to address the problem of Lamar's racism directly rather than ignore one of the key figures in the region's history. The racism that Lamar expressed so freely in defense of slavery before the Civil War continued after the war to justify the political subordination of former slaves, and Lamar never freed himself of the conviction that freed blacks were inherently inferior to whites in "intelligence and virtue and sagacity."[55] He shared with most white men of his day a complex view of racial character which viewed blacks as inherently and naturally inferior in virtually every respect.[56] He saw whites as a purer breed with superior blood lines.[57]

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[52] L.Q.C. Lamar, Speech in the Senate (January 25, 1881), *in* 46 Cong. Rec., 3d Sess., 46 CONG. REC. (1881).

[53] *Id.*

[54] The history of Lamar's reputation is well worth a separate study. The decline in interest in Lamar by southern historians is strikingly demonstrated by the virtual exclusion of any but the most fleeting mention of Lamar's career in a recent, and purportedly comprehensive, encyclopedia. The only reference to his career is the following explanation of the origin of name of the L.Q.C. Lamar Society: "The group named itself after L.Q.C. Lamar, an ardent Mississippi secessionist in the 1860's who became a champion of ciliation after the Civil War." 2 ENCYCLOPEDIA OF SOUTHERN CULTURE 504 (C. Wilson & W. Ferris ed. 1991). The only other reference to Lamar is the observation that he, as Secretary of the Interior, supported the president's position. 1 ENCYCLOPEDIA OF SOUTHERN CULTURE 565 ("The Mississippi politician L.Q.C. Lamar, in his position as Secretary of the Interior, supported President Cleveland's call for forest reserves.").

Likewise, in the essays published in a two-volume history of Mississippi, Lamar's importance was formally acknowledged by one writer. Frank E. Everett, Jr., *Lawyers, Courts, and Judges 1890-1970*, 2 A HISTORY OF MISSISSIPPI 375-91 (Richard Aubrey McLemore ed. 1973) ("L.Q.C. Lamar has been recognized as a United States Supreme Court Justice, professor of Law, United States Senator, and Cabinet member. He was also a most effective and courageous court lawyer. In the years after the Civil War, Lamar stood above all men of his time in statesmanship and legal talent."). Nevertheless, most of the essays completely neglected Lamar or referred to him only in passing, with the exception of James G. Revels, *Redeemers, Rednecks and Racial Integrity*, 1 A HISTORY OF MISSISSIPPI 590-622 (1973).

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[55] L.Q.C. Lamar, Speech in the Senate, 45th Cong., 3d Sess., 34 CONG. REC. 87-89 (1878), *quoted in* MURPHY, *supra* note 4, at 203. Lamar typified what Woodward would classify as the conservative attitude towards black people, "an aristocratic philosophy of paternalism and *nobless oblige*," which repudiated the fanatical race hatred, violence, and apartheid supported by white extremists. *See generally* C. Vann Woodward, THE STRANGE CAREER OF JIM CROW 47 (2d rev. ed. 1966).

[56] The ideological justification for slavery differed radically from the justification for the unequal legal treatment of woman. Lamar characterized woman as morally and naturally superior and explained her subordinate role "because the necessities of society demand her consecration to those high and noble responsibilities which unfit her for the exercise of political rights." L.Q.C. Lamar, Speech (February 21, 1860), *in* MAYES, *supra* note 4, at 627. In a speech after the war at the Female Institute at Jackson, Tennessee, Lamar stated that he saw "no generic difference between the mind of man and woman." Meador, *supra* note 33, at 247.

[57] Just as Douglass observed a racist differentiation in the treatment of slaves with mixed racial parents, DOUGLASS, *supra* note 21, at 59, Lamar expressed a belief in racial differentiation among whites, curiously associating superior genetic features with Jews: "Look at his children," he wrote of someone he suspected of being Jewish, "they are Jew, all over, I think so because, beyond any American politician except Benjamin [a Jew] he has not only the will, the ambition & popular aptitudes of the American Statesman, but also the artistic delicacy of the Jewish mind. You know I think the mixture of that blood is to the human family like a cross of the Jersey on the bovine race." Letter from L.Q.C. Lamar to S.A. Jonas (June 15, 1884), *in* MURPHY, *supra* note 4, at 233 n.47. The meaning of the comparison of Jews to Jerseys is amplified by the fact that Lamar, who bred milk cows, prized the Jersey above all breeds. The astonishing implications of Lamar's identification with an inferior breed are suggested unconsciously by a letter to his wife of July 1884, in which he wrote with delight of his trade of a half-Jersey heifer and calf for 35 acres of good land in Taylor. He was especially pleased because the trade left him with only one cow that was not pure Jersey: "I want to dispose of the other half-breed & then I will have nothing but pure Jerseys. I think my little herd is the handsomest I ever saw. But the presence of the common stock is a blemish." Letter from L.Q.C. Lamar to Virginia Lamar (July [n.d.], 1884), *in* LAMAR FAMILY PAPERS, *supra* note 8.

Douglass likewise identified personally with cattle, but with work oxen. *See* DOUGLASS, *supra* note 21, at 212 ("Tame and docile to a proverb, when *well* trained, the ox is the most sullen and intractable of animals when but half broken to the yoke. I now saw, in my situation, several point of similarity with that of the oxen. They were property, so was I; they were to be broken, so was I. Covey was to break me, I was to

Such racism was compatible with a benignant paternalism, and Lamar was remembered for his anonymous charity to poor blacks.[58] And in at least one case, Lamar surmounted his prejudice to form an enduring friendship with a black—Republican Senator Bruce—that was based on genuine respect.[59]

Lamar's racism negatively affected his performance in Congress. His consistent opposition to federal civil rights legislation[60] might be politically understandable: for Lamar "redemption" of state sovereignty was incompatible with federal protection of black rights. But his persistent denial in national fora of the existence of serious racial conflict in the South and his denial of any interference with black voting rights has supported accusations that Lamar engaged in a deliberate and cynical policy of disinformation.[61] The dynamics of the conversion disorder[62] suggest the possibility that Lamar simply could not see or acknowledge the reality of outrages against blacks,[63] and even his most critical biographer concludes that "[n]othing in his correspondence indicates willful hypocrisy, and no

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break them; break and be broken—such is life.").

[58] Blanche K. Bruce, *Tributes to, and Comments on, the Life and Character of Mr. Lamar*, B. HERALD, January 28, 1893, *reprinted in* MAYES, *supra* note 4, at 594. Bruce had himself received a federal patronage position with Lamar's help in the 1870's. *See* Meador, *supra* note 43, at 40. Lamar was criticized by white Democrats for his patronage awards to blacks. *See* Revels, *supra* note 54, at 616.

[59] When Lamar faced some opposition to the acceptance of his credentials in the Senate, Bruce, who was the senior Senator from Mississippi, a former slave, and a loyal Republican, supported Lamar. Because of Bruce's unimpeachable credentials and motives, the opposition was easily overcome. MURPHY, *supra* note 4, at 180. The two senators formed an enduring friendship despite their radical political differences. *See* Bruce, *Tributes to, and Comments on, the Life and Character of Mr. Lamar*, B. HERALD, January 28, 1893, *reprinted in* MAYES, *supra* note 4, at 593.

[60] MURPHY, *supra* note 4, at 204.

[61] *See, e.g.*, MURPHY, *supra* note 4, at 203. "To achieve [his] ends he combined statesmanship of high order and bald deception of the northern people who badly wanted to believe what he said." *Id.* at 133. For the accusation of Ames, see MURPHY, *supra* note 4, at 115 n.40.

[62] *See supra* note 20 and accompanying text.

[63] His response to a race riot in Hamburg, South Carolina in 1876 is instructive. He denounced the white killers but denied that the riot concerned black voting rights and opposed any federal interference, leaving the matter entirely to the state. *See* MURPHY, *supra* note 4, at 132.

inconsistency appears between his public and private declarations."[64]

Though Lamar was hardly a champion of civil rights, a balanced judgment of his historical role must record that he was not a revanchist. Unlike other leaders of the rebellion, he did not retreat into a martyr-like conviction of the injustice of the defeat of the Confederacy; nor did he flee his state and country, whose reunification pressed home the painful lessons of defeat. Lamar accepted the reality of defeat, and his return to national politics reflected his commitment to participating in a new national union. As part of the postwar status quo, he conceded both the need for and benefits of black voting rights. All of his blindness to the reality of racial intimidation of blacks in the South did not prevent him from writing in *The North American Review*:

> I concur . . . that the ballot has been in the hands of the negro both a defense and an education. . . . If slavery was to be abolished, it must, I think, be admitted that there could be nothing short of complete abolition, free from any of the affinities of slavery; and this would not have been effected so long as there existed any inequality before the law. The ballot was, therefore, a protection of the negro against any such condition, and enabled him to force his interests upon the legislative consideration of the South.[65]

Lamar rationalized the manipulation of the black vote as the inevitable result of the fact that "at this stage of its progress, the negro vote can not intelligently direct itself."[66] Yet in his campaigns, Lamar appealed to the vote of blacks,[67] and he rejected the "color line" approach favored by extremist Democrats.[68] Lamar's acceptance of the black vote was not just a concession to the inevitable.[69] Rather Lamar's recognition of black legal rights was a radical change from his pre-war views, and his rhetorical defense of black rights helped create the conditions for a national compromise in which his region's acceptance of the letter, if not the spirit, of the postwar amendments was a crucial, and by no means assured, ingredient.

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[64] *Id.* at 133.

[65] L.Q.C. Lamar, *Ought the Negro to be Disfranchised? Ought he to have been Enfranchised?*, 268 N. AM. REV. 232 (1879).

[66] *Id.* at 234.

[67] *See* MURPHY, *supra* note 4, at 155.

[68] Lamar was quoted as stating, "One of the principles of Democratic government is that all parts of the body politic shall contribute to its support and control. Any race organization which seeks to assert the exclusive management of a country may have good government, but cannot have liberty. It is tyranny unmixed, and is fraught with

Lamar early recognized the central economic role of the federal government after the Civil War, and he devoted serious attention to the chief economic issues that came before Congress. The policy he came to advocate was a mix of monetary conservativism—he opposed devaluing currency or freeing it from the gold (or gold-silver) standard[70]—and fiscal activism.[71] He supported federal projects to develop economic infrastructure, such as projects to reclaim and improve land along the Mississippi River[72] and to develop canals.[73] He took a special interest in legislation to support railroads.[74]

In 1876 Lamar played a leading role in resolving a major political crisis. The presidential contest between Republican Hayes and Democrat Tilden led to charges of electoral fraud, and electoral votes were disputed in several states. There was no clear method for resolving the dispute, and the crisis grew so hostile that Lamar feared an outbreak of civil violence.[75] Two years later he remarked in a speech: "I believe that the most dangerous event in our history, not excepting the war of secession, was the contest over the result of the Presidential

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disaster." MURPHY, *supra* note 4, at 156 (quoting *Weekly Mississippi Pilot* (Jackson), August 7, 1875). Lamar was even viewed by some contemporaries as a champion of black civil rights. MURPHY, *supra* note 4, at 156 n.23.

[69] *Id.* at 203.

[70] *Id.* at 135-38; MAYES, *supra* note 4, at 323-48. He initially supported linking currency to bimetallic (gold and silver) standards, but he later came to believe that only a gold-based standard successfully resisted devaluation and inflation.

[71] MURPHY, *supra* note 4, at 138. On spending issues, Lamar voted with the Republicans more consistently than almost any other southern Democrat. *Id.* at 139 n.13.

[72] *Id.* at 140.

[73] *Id.* at 142.

[74] *Id.; see* MAYES, *supra* note 5, at 349-51.

[75] MURPHY, *supra* note 4, at 165 n.11.

election of 1876."[76] Lamar promoted a bill that created a bipartisan Electoral Commission to arbitrate the disputed election.[77] The Commission ultimately awarded the disputed votes to Hayes. Lamar was bitterly disappointed—personally and politically—by the outcome of the Commission, and he voted against some of the results, but he nevertheless defended the authority of the outcome. His role in averting a major crisis was given prominent attention in *Profiles in Courage*:

> Lamar, a man of law and honor, could not now repudiate the findings, however shocking, of the Commission he had helped establish. He supported the findings of the Commission because he believed that only force could prevent Hayes' inaugural and that it would be disastrous to travel that road again. It was better, he believed, for the South—in spite of provocation—to accept defeat on this occasion. He was skillful enough, however, to get Hayes committed to concessions for the South, including the withdrawal of military occupation forces and a return to Home Rule in key states.[78]

In 1877 Lamar was seated as junior senator from Mississippi, having been elected overwhelmingly and without serious opposition by the Mississippi legislature in 1876.[79] He would be reelected (unopposed) and serve in the Senate until 1885. The first major issue Lamar confronted in the Senate was the movement to return from a gold to a gold and silver standard for currency. The pro-silver position had gained much popular support, including in Mississippi, where inflation was viewed optimistically as a remedy for the depressed economy. Consistent with his monetary principles in the House, Lamar resisted devaluing currency, and he sided with Republicans opposing the silver bill. The Mississippi legislature adopted a resolution supporting the silver bill, instructing congressional representatives to vote for it, and criticizing Lamar for his opposition.[80]

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[76] L.Q.C. Lamar, speech, *quoted in* MAYES, *supra* note 4, at 297.

[77] *See* CHARLES FAIRMAN, FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877 52-53 (1988) (*History of the Supreme Court of the United States* series, 7 *Oliver Wendell Holmes Devise*, supplement).

[78] KENNEDY, *supra* note 1, at 184-85. For an account of Lamar's role in the Hayes-Tilden controversy, *see* CATE, *supra* note 4, at 265-303; MAYES, *supra* note 4, at 290-305; MURPHY, *supra* note 4, at 162-79.

[79] MAYES, *supra* note 4, at 272. At the time, of course, Senators were selected by the state legislature. U.S. CONST. art. I, § 3. Direct election was provided for in 1913. U.S. CONST. amend. XVII.

Lamar disregarded the instructions from the state legislature and, in opposing the bill, addressed the pressure from his constituents:

> Between these resolutions and my convictions there is a great gulf. I cannot pass it. Of my love to the State of Mississippi I will not speak; my life alone can tell it. My gratitude for all the honor her people have done me no words can express. I am best proving it by doing to-day what I think their true interests and their character require me to do. During my life in that State it has been my privilege to assist in the education of more than one generation of her youth, to have given the impulse to wave after wave of the young manhood that has passed into the troubled sea of her social and political life. Upon them I have always endeavored to impress the belief that truth was better than falsehood, honesty better than policy, courage better than cowardice. To-day my lessons confront me. To-day I must be true or false, honest or cunning, faithful or unfaithful to my people. Even in this hour of their legislative displeasure and disapprobation I cannot vote as these resolutions direct. I cannot and will not shirk the responsibility which my position imposes. My duty, as I see it, I will do; and I will vote against this bill.[81]

The impact of the speech was magnified by the fact that the bill's adoption by a large majority was a foregone conclusion.[82]

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[80] MURPHY, *supra* note 4, at 194.

[81] L.Q.C. Lamar, Speech (February 15, 1877), 45th Cong., 2d Sess., 28 CONG. REC. 1061 (1877), *reprinted in* MAYES, *supra* note 4, at 334. In disregarding the legislature's instructions, Lamar rejected the doctrine of obedience to instructions. Before the war he had denounced Mississippi's Senator Foote for disregarding the legislature's instructions to vote against the admission of California. *See* MAYES, *supra* note 4, at 52 (discussing notes on Lamar's speech); *see also* CATE, *supra* note 4, at 38; MURPHY, *supra* note 4, at 16.

[82] Though Lamar gave a great deal of study to economic matters and often broke party rank in voting on such issues, there is little discussion of his economic views. Murphy treats his positions almost entirely in partisan terms, concluding that he opposed the tariff as a concession to the agrarian constituency. MURPHY, *supra* note 4, at 237. Yet Lamar showed his indifference to political pressure when far more controversial issues were at stake. His studied resistance to protectionism appears

Lamar's continuing commitment to federal economic support for infrastructure was reflected in his membership on the Senate Committee on Railroads and, later, the Mississippi River Committee, and in his regular support for various bills to improve waterways and railroads.[83]

Lamar delivered only one major speech in the Forty-eighth Congress, and it is often overlooked. But his Speech in Support of National Aid to Education[84] is one of the most powerful and revealing works of his public life. His support for national funding of state common schools was consistent with his support for federal funding for public works. Southern states had a special need for federal support because of the vast number of uneducated youth and the inability of southern states to finance their own educational systems. Because the revenues would be divided among states according to the number of illiterate persons, the southern states also stood to benefit most from the program.[85]

But support for education had a positive impact on race relations. Lamar explicitly linked the issue of support for education to the issue of the fate of blacks in the South. Though he had persistently resisted federal intervention to police black civil rights, he now forcefully defended federal support for education, emphasizing the benefits for blacks:

> In my opinion [the bill] is the first step and the most important step that this Government has ever taken in the direction of the solution of what is called the race problem, and I believe it

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consistent with his underlying monetary conservatism, for the tariff had the direct effect of raising prices on imported goods. The tariff shifted the cost of industrialization to the farmer and consumer, but this may have been of less decisive importance to Lamar than his arguments suggest.

[83] MURPHY, *supra* note 4, at 198-201, 206, 209, 233. His presence and activity in the Senate were seriously reduced from 1880 through 1882 due to his ill health, his wife's ill health, and the need to campaign for re-election. *Id.* at 217-32. He made a point of speaking against a bill to disenfranchise Mormons, arguing that not all Mormons should be punished for the polygamy of some. *Id.* at 232. He was also largely inactive even after returning to the Senate in 1883. *Id.* at 239.

[84] L.Q.C. Lamar, Senate Speech on National Aid to Education (March 28, 1884), *in* 48th Cong., 1st Sess., 67 CONG. REC. at 2368-71 (1884).

[85] MURPHY, *supra* note 4, at 240.

> will tell more powerfully and decisively upon the future destinies of the colored race in America than any measure or ordinance that has yet been adopted in reference to it—more decisively that either the thirteenth, fourteenth, or fifteenth amendments, unless it is to be considered, as I do consider it, the logical sequence and the practical continuance of those amendments.[86]

Lamar confessed frankly the economic and social difficulties facing the delivery of education in the South. He wholeheartedly supported black education: "The problem of race in a large part is the problem of illiteracy. Most of the evils, most of the difficulties which have grown up out of that problem have arisen from a condition of ignorance, prejudice, and superstition."[87] Lamar's support for education revealed in part his paternalistic view that the black vote was manipulated because of the ignorance of blacks,[88] and his motives in supporting the education bill have been questioned,[89] but his speech evinces a passionate commitment to education that drew on his personal experience as an educator. His speech further expressed his conviction that political liberty and legal rights were rooted in a society's level of culture.

> Liberty can not be manufactured by statutes or constitutions or laws. It is a moral and intellectual growth. It is the outgrowth of men's natures, and feelings, and passions, and instincts, and habits of thought. A people who remain ignorant and superstitious and debased can not be made free by all the constitutional guarantees and statutes that you surround them with. You may force power upon them and subject others to their rule, but the great attribute of self-government and that

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[86] L.Q.C. Lamar, *supra* note 84, at 2368-69.

[87] *Id.* at 2370.

[88] The paternalism behind the view is offensive, but Lamar's views should be distinguished from the position, which Lamar repudiated, that blacks should be kept illiterate as a means of depriving them of power. Black slaves were systematically denied the power to read. See DOUGLASS, *supra* note 21, at 58, 145-46, 155-56. Racist opposition to black literacy was so common after the war that Mark Twain satirized the arguments made in defense of illiteracy. MARK TWAIN & CHARLES DUDLEY WARNER, THE GILDED AGE: A TALE OF TO-DAY 187-88 (1874).

[89] MURPHY, *supra* note 4, at 241 ("If his support of education for Negroes was sincere and not only a rhetorical appeal to northern sympathies . . . .").

> real liberty which comes from it you can not confer on them while they remain ignorant and in bondage to their own passions and to their own prejudices and superstitions.[90]

Education was a prerequisite and necessary foundation for real freedom—for society in general and for blacks in particular:

> [I]nstitutions and laws and governments and all the fixed facts of society are but the material embodiment of the thought of a people and the substantial expression of their inner life; and liberty, which is the culmination of them all . . . to be permanently possessed and enjoyed must be earned, as the reward of the development of our moral and intellectual faculties.[91]

These arguments expressed some of Lamar's deepest personal values. Even before the Civil War Lamar had stated, "[i]nstitutions and constitutions and laws and governments are at last but external structures whose roots are in the moral and intellectual life of the people for whom they exist . . . ."[92] For Lamar, rooting of moral and political behavior in culture and education was not mere social theory; it was a conviction that informed his personal life. He confessed in a personal letter to his daughter Augusta, "[t]he longer I live the more I see that warm emotions & lofty sentiments are often unaccompanied by a worthy conduct of life. And that a fixed resolution carried constantly into action & habit is the indispensable condition of real happiness & of moral goodness."[93]

The Speech on National Aid to Education was, perhaps, Lamar's most eloquent and personal expression of his political vision. In decrying the flight of good teachers from education in the South because of low salaries, Lamar spoke with personal experience, for soon after he had left law teaching, state budget cuts to salaries had led to the closure of his law school.[94] He insisted on the moral obligation of government to play an active role in forming good character and nurturing citizenship. "For my part," he insisted, "I would leave no legitimate effort unused and no constitutional means unemployed which would give to every human being in this country that highest title to American citizenship—virtue, knowledge, and judgement."[95]

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[90] L.Q.C. Lamar, *supra* note 84, at 2370. In remarks about the inadequate levels of salary compensation at the end of the speech, Lamar referred specifically to his experience as an educator. *Id.*

[91] *Id.*

[92] L.Q.C. Lamar, Speech in the House of Representatives (February 21, 1860), *reprinted in* MAYES, *supra* note 4, at 625.

[93] Letter from L.Q.C. Lamar to Augusta Lamar Heiskell (February 29, 1884), *in* LAMAR FAMILY PAPERS, *supra* note 8.

Lamar did not view education as a panacea. He tempered his enthusiasm with pessimism about any immediate results. Suspicious of federal presence in the states, he rejected the idea of a separate federal education agency for distribution of the funds.

In 1884 Grover Cleveland was elected the first Democratic president since the Civil War. Lamar's leadership position in the party was recognized by his appointment as Secretary of the Interior in 1885. Lamar deserves credit for administering forward looking policies in the Interior Department: he administered the Indian Bureau so as to protect Indian tribal lands and reservations from homesteading;[96] he sought to conserve public lands against the pressure to exploit them commercially.[97] Under Lamar, the Department recovered millions of acres of public land from private owners, largely railroads, that held them improperly under land grants.[98]

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[94] CABANISS, *supra* note 33, at 95. The University, which had survived a civil war and military occupation, was seriously threatened in the 1870's by reductions in the budget. In addition to the closure of the law department from 1874 to 1877, the Board combined the duties of the university janitor and librarian in a new position termed janitor-librarian. *Id.* Advocates of Critical Legal Studies have more recently proposed exchanging and merging different university jobs. *See generally* KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS NAPOLEON, *in* THE PORTABLE KARL MARX 287 (E. Kamenka ed. 1983) ("Hegel observes somewhere that all great incidents and individuals of world history occur, as it were, twice. He forgot to add: the first time as tragedy, the second as farce.").

[95] Lamar, *supra* note 84, at 2370.

[96] MURPHY, *supra* note 4, at 254-55.

[97] *Id.* at 256-57.

[98] *Id.* at 258.

C. Lamar as Judge (1888-1893)

There is surprisingly little scholarship on Lamar's activity as a judge. Perhaps scholars have given too much credibility to Lamar's self-deprecating statements. Lamar was often self-effacing, and he grew increasingly melancholy under the pressures of political life, his wife's ill health, and his own sickness and aging. He wrote his wife in 1884:

> It was my hope to have been able to go home this last month but my duties here run all through each week so that I could not get home & stay long enough without being absent from an important committee meeting. I hope yet to be able to leave Washington before the adjournment. I am most anxious to get home. I have no idea what the cost of fixing up the store will be. I would like also to go to the farm & see how things are getting on there.
>
> I am tired of all this thing here. I feel my inspiration for effort gone. My ambition now is confined to being with my beloved wife & doing all I can to make her happy.
>
> Day follows day here without excitement or interest. A new generation of public men is coming here & I feel myself almost a superfluous veteran on the stage.[99]

Lamar depended on his salary. "How I deplore not having saved up my money. Had I done so I could quit, & stay at home with [my wife]."[100] In 1887 he observed, "I don't think I am much in an individual way. The nation has robbed me of private life in giving me public duties."[101]

Lamar questioned his qualifications for the bench:

> The S.C. Judgeship I know nothing about, except the impression on the minds of others, from conversations with President. He has never spoken to me about it except in relation to the

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[99] Letter from L.Q.C. Lamar to Virginia Lamar (April 30, 1884), *in* LAMAR FAMILY PAPERS, *supra* note 8.

[100] Letter from L.Q.C. Lamar to Augusta Lamar Heiskell (November 27, 1883), *in* LAMAR FAMILY PAPERS, *supra* note 8.

[101] Letter from L.Q.C. Lamar to Augusta Lamar Heiskell (January 25, 1887), *in* LAMAR FAMILY PAPERS, *supra* note 8.

> qualifications of others for for [sic] the position. I don't regard myself as qualified for it.[102]

Lamar's appointment to the Court to fill the position vacated with the death of Associate Justice Woods[103] in May, 1887 sparked a major political controversy, which historians have discussed at length.[104] But Lamar may have been considered for a judicial appointment as early as the spring of 1886.[105]

Lamar was more than minimally qualified. His experience included private practice representing individual and corporate clients in civil and criminal matters; law school teaching; legislative experience in a state legislature, the House, and Senate; and administrative experience in the executive branch as Secretary of the Interior.

The scholarly neglect of Lamar as judge may also reflect the perception that Lamar's tenure on the Court was too brief for him to have any effect.[106] The neglect may not accurately reflect Lamar's *reputation*, however, for a survey of academicians in 1970 placed Lamar squarely in the middle "average" category—in which group also fell such judicial figures as Justices Reed, Potter Stewart, and Thurgood Marshall.[107]

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[102] Letter from L.Q.C. Lamar to Augusta Lamar Heiskell (July 5, 1887), *in* LAMAR FAMILY PAPERS, *supra* note 8.

[103] "[B]y 1870 every Supreme Court seat was held by a northerner or westerner." CONGRESSIONAL QUARTERLY, INC., CONGRESSIONAL QUARTERLY'S GUIDE TO THE UNITED STATES SUPREME COURT 787 (Elder Witt ed. 1979) [hereinafter CONGRESSIONAL QUARTERLY]. Justice Woods was the first southerner appointed after the war, though he had moved to Georgia only after the war. *Id.* The seat occupied by Woods was thus regarded as a "southern" seat.

[104] Lamar was the first Democrat appointed since 1862 and the first Confederate army veteran. 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 624-25 (1935). Republicans in the Senate opposed Lamar because of his Confederate past and resistance to Reconstruction. Meador suggests that such opposition was motivated by the desire to embarrass Democrats in the next 1888 presidential election. Meador, *supra* note 33, at 228. In addition to the obvious political issues presented by Lamar's appointment, there was concern that he was too old. This may seem strange since Lamar was only sixty-two. But a justice had to serve ten years in order to qualify for full pension, and there had been recent experience with a justice who had become senile at seventy. *See* LEO PFEFFER, THIS HONORABLE COURT: A HISTORY OF THE UNITED STATES SUPREME COURT 206 (1965).

[105] A letter to his daughter added a postscript, "P.S. Will write you all about the Judgeship." Letter from L.Q.C. Lamar to August Lamar Heiskell (April 25, 1886), *in* LAMAR FAMILY PAPERS, *supra* note 8. The reference is unclear. There was no Supreme Court vacancy in 1886—Justice Woods' seat was the first to open since Hunt's death in 1882. Yet there was also no position on the Fifth Circuit at the time. Judge Robert A. Hill continued for many years as Circuit Judge for the Northern and Southern Districts of Mississippi.

Lamar is often characterized as a judicial conservative and strict constructionist.[108] Yet the starting point for understanding Lamar must be the recognition that in general he participated fully with the majority of the Court in an era characterized by "a marked disposition to enhance the powers of the National Government by a liberal construction of the Constitution, and to widen the scope of the jurisdiction and powers of the National Judiciary."[109] To be sure, he recognized limits on federal power, but his judicial record suggests that he was more concerned with the substantive power at issue and the rights adversely affected than by the distinction between the express or implied source of such powers. For example, he did not object to the exercise of federal power to exclude Chinese persons because of their race.[110] But his concern with the discrimination against Mormons that had surfaced during his career in Congress led him to dissent from a decision that upheld various federal anti-Mormon statutes on the theory of virtually unlimited federal authority over the territories.[111]

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[106] This was suggested even by the Chief Justice's remarks upon Lamar's death that "only failing health and strength could have prevented him from ultimately attaining decided judicial eminence." *In Memoriam, Lucius Quintus Cincinnatus Lamar, died January 23, 1893*, 37 L. Ed. 1232 App. IV, at 1232-35 (1893).

[107] *See* ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 39 (1978). The participants in the survey included no one from Mississippi. *Id.* at 117-18. It is best not to inquire too closely into the validity of such a survey. Easterbrook suggests—humorously but nonetheless correctly—that the large "average" category probably contains the least important justices. Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481, 484 (1983). Easterbrook identifies Justice Todd as "most insignificant." *Id.* at 496. Todd authored 14 opinions in 17 terms. Lamar is in a different league, with over 100 opinions in five years—and nine reported decisions as circuit justice. *See infra* Table of Cases.

[108] "Lamar served only five years on the Court, becoming well-known for his strict constructionist views and traditional interpretations. He believed in a limited application of the Fourteenth Amendment's protection clauses . . . ." HOWARD B. FURER, THE FULLER COURT 1888-1910 243 (1986) (5 *The Supreme Court in American Life* series).

[109] WARREN, *supra* note 104, at 625. Lamar did not dissent, for example, from what Warren identified as the "first great case sustaining the National power" after Lamar joined the Court. *Id.* at 695 (citing Chinese Exclusion Case, Chae Chan Ping v. United States, 130 U.S. 581 (1889) (upholding unlimited sovereign power of federal government to exclude foreigners)). Nor did Lamar dissent from other major cases expanding federal legal authority. *See, e.g.*, Geofroy v. Riggs, 133 U.S. 258 (1890) (holding that federal treaty power superseded state laws of inheritance).

Even where Congress expressly granted power to the executive, Lamar opposed the grant where it conflicted with his vision of the proper separation of government powers. Thus he dissented from a case that upheld the constitutional validity of trade legislation that effectively granted the President absolute power to impose duties on certain imported goods in order to coerce favorable trade treatment from other foreign countries.[112]

Lamar was especially alarmed by the extension of federal authority (whatever its constitutional source) that brought federal power into direct collision with local power. Accordingly, he dissented from the decision of *In re Neagle*,[113] where the Court held a federal marshal acting pursuant to federal law to be immune to state criminal prosecution. His dissent, "[u]sually regarded as his most outstanding opinion,"[114] protested the judicial creation of immunity in the absence of legislative action; but his concern was clearly broader than judicial activism, and he concluded by observing that the Court's decision divested states "of what was once regarded as their exclusive jurisdiction over crimes committed within their own territory, against their own laws, and . . . [authorized a federal judge] to deprive a State of its power to maintain its own public order, or to protect the security of society and the lives of its own citizens . . . ."[115]

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[110] *Chinese Exclusion Case*, 130 U.S. at 581.

[111] Lamar concurred in a dissenting opinion of the Chief Justice, who observed, "absolute power should never be conceded as belonging under our system of government to any one of its departments." The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 67 (1890) (Fuller, C.J., dissenting).

[112] Field [Marshall Field & Co.] v. Clark, 143 U.S. 649, 697-700 (1892) (Lamar, J., dissenting). Justice Lamar and Chief Justice Fuller dissented on the grounds that the grant to the President was an improper delegation of legislative authority and also an improper grant of treaty making authority. *Field*, 143 U.S. at 697. Lamar did not limit his restrictive approach to constitutional powers to the executive branch. In United States v. Texas, 143 U.S. 621 (1892), he joined the Chief Justice in dissenting from a decision in which the Court exercised original jurisdiction in a suit in equity by the government against a state to determine their respective boundary. *Texas*, 143 U.S. at 648-49.

[113] 135 U.S. 1 (1890); *see infra* part III. "This was the broadest interpretation yet given to implied powers of the National Government under the Constitution." WARREN, *supra* note 104, at 697.

[114] FURER, *supra* note 108, at 243.

Lamar's restrictive approach to federal immunity was illustrated by his decision as Circuit Justice the following year. A Unites States marshal for a district in Tennessee had been convicted in Mississippi state court of carrying a concealed weapon and petitioned the federal court for habeas corpus relief.[116] Lamar reversed the granting of relief on the narrow ground that the marshal's authority was limited to the Tennessee district for which he was appointed.[117] Sitting as trial judge in another case, Lamar held that the murder of a witness in federal grand jury proceedings did not constitute the offense of injuring or conspiring to injure the enjoyment of a constitutional right, because the right to testify was not a right specifically conferred by the Constitution.[118]

In drafting opinions, Lamar most often spoke for the majority and most often affirmed the decision below.[119] But, he wrote the opinion in the only case that reversed a decision by Oliver Wendell Holmes,[120] who was then sitting on the Supreme Judicial Court of Massachusetts.[121] In grappling with the respective areas of authority allocated to state and federal governments under the commerce clause, Lamar expanded the distinction between manufacturing and commerce so as to preserve state control over domestic manufacture even where the product of the manufacturing affected interstate commerce.[122] He thus played a major role in establishing a restrictive approach to commerce clause jurisprudence that dominated the Court's thinking for over a generation. The effect of his approach to the commerce clause was to free carriers, notably railroads, from burdensome federal (and occasionally state) regulation.[123]

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[115] *In re Neagle*, 135 U.S. at 99.

[116] The marshal had in fact borrowed the weapon from the deputy sheriff of Alcorn county in order to apprehend a criminal; the marshal was subsequently arrested by the mayor who observed him carrying the weapon. Walker v. Lea, 47 F. 645, 646-47 (C.C.N.D. Miss. 1891).

[117] *Walker*, 47 F. at 649.

[118] United States v. Sanges, 48 F. 78, 87, 91 (C.C.N.D. Ga. 1891); *accord* Morgan v. Null, 117 F. Supp. 11 (D.N.Y. 1953) (holding that interference with attempt to submit information to grand jury could not support private action for conspiracy to interfere with civil rights where there was no legal right or privilege to present such information to grand jury). Lamar pointed out that the conduct constituted a federal offense under a different statute. *Sanges*, 48 F. at 83.

[119] The Table of Cases, *infra* part V, lists all the opinions that Lamar authored but does not identify court opinions and concurring or dissenting opinions authored by others that he joined. Only three of 103 opinions were dissents. Less than one fourth of his opinions reversed lower court decisions.

Prevailing appellate procedure (dominated by the writ of error and exceptions) significantly limited the scope of appellate review of the merit of cases. Nevertheless, Lamar reversed a judgment for a defendant railroad in one case where the defense of "act of God" was supported by "no evidence that the rain [causing the landslide] was of extraordinary character . . . ."[124]

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[120] *See* Williams v. Heard, 140 U.S. 529 (1891).

[121] Holmes recorded his reaction to the reversal in private correspondence at the time, stating that "the ground adopted by the U.S. Court [was] one which is quite irreconcilable with primary juridical notions." 1 OLIVER WENDELL HOLMES, HOLMES-POLLOCK LETTERS, THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDRICK POLLACK, 1874-1932 39-40 (Mark de Wolfe Howe ed., 1941). Holmes was without doubt referring to Lamar's natural law argument. *See generally* MICHAEL HOFFHEIMER, JUSTICE HOLMES AND THE NATURAL LAW 17-26 (1992).

[122] Kidd v. Pearson, 128 U.S. 1, 17 (1888). Professor Balkin credits Lamar's opinion with creating "the manufacturing/commerce distinction that figured so prominently in the *Lochner* period." J.M. Balkin, *Review Essay: Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 921-22 (1988); *see* CONGRESSIONAL QUARTERLY, *supra* note 103, at 320. Another scholar characterizes the case as constituting more of an incremental change. Sam Kalen, *Reawakening the Dormant Commerce Clause in its First Century*, 13 U. DAYTON L. REV. 417, 468 (1988).

[123] "[I]n cases dealing with the regulation of interstate commerce, [Lamar] tended not only to side with the carriers, but also to favor judicial scrutiny of state railroad rate schedules. . . . Yet, he was flexible enough to sometimes sustain state regulation over interstate commerce when the 'public interest' doctrine of *Munn v. Illinois* [94 U.S. 113] (1877) conformed to his own philosophy." (citation added). Furer, *supra* note 108, at 243.

One Court critic accused Lamar of corruption in his decisions supporting carriers because of his past involvement with railroads as director and shareholder. GUSTAVUS MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 572 (photo. reprint 1968) (1912). But Lamar's conduct seems at all times to have conformed to the judicial ethics of the age.

In construing language, Lamar advocated one of the most extreme applications of "plain meaning:"

> To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. [Citations omitted.] So, also, where a law is expressed in plain and unambiguous terms whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. [Citations omitted.]
>
> There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a State, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption.[125]

Behind his rule of construction lay an extraordinary optimism in the transparency of language to an underlying meaning that approached a faith in universal language: "Words are the common signs that mankind make use of to declare their intention to one another . . . ."[126]

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[124] Gleeson v. Virginia Midland R.R., 140 U.S. 435, 439 (1891).

[125] Lake County v. Rollins, 130 U.S. 662, 670-71 (1889).

Consistent with this view of language, and with those decisions resisting the grant of implied powers to the government, Lamar held that a treaty that excluded certain claims from Claims Court jurisdiction applied only to the enforcement of the "right itself" and did not deprive the court of jurisdiction in a claim to satisfy a judgment based on the right.[127] He interpreted an exclusion narrowly in order to preserve a meritorious claim.[128]

Yet in another case he concluded that the state had not erred in construing a federal statute: "[W]e must look to the spirit and reason of this provision of the law, and construe it with reference to its evident purpose to connect with the exercise of the privileges therein granted such limitations as will guarantee protection to the navigating interests affected by the proposed legislation."[129] And he construed a federal statute that criminalized the mailing of any "obscene, lewd or lascivious book, pamphlet, picture, paper, writing, print or other publication of an indecent character"[130] so that it did not apply to the text of an obscene letter.[131]

Lamar revealed a special affinity for equity cases where he could approach more directly the merits of controversies. In a will dispute that had raged for many years, Lamar gave effect to private agreements among the heirs. The case was complicated by a variety of texts—will, contracts, modifications—but Lamar seized on the real interests of parties, the public good, and substantive fairness in order to cut the Gordian knot:

> It will be observed that we have not seen fit to determine the legal effect of the will . . . or the modifying contract . . . . We have proceeded, rather, on the real intention of the parties, as

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[126] *Lake County*, 130 U.S. at 671.

[127] United States v. Weld, 127 U.S. 51, 57 (1888).

[128] *Weld*, 127 U.S. at 57.

[129] Hannibal & St. Joseph R.R. v. Missouri River Packet Co., 125 U.S. 260, 270 (1888).

[130] 19 Stat. 90 (1876), *quoted in* United States v. Chase, 135 U.S. 255, 257 (1890).

[131] *Chase*, 135 U.S. at 258.

> manifested by that agreement and the subsequent oral agreements shown by the evidence to have existed. Those agreements when made were fair to all interested, and having been acted upon and acquiesced in by every one concerned for a long period, ought to be taken as the basis of the final settlement.
>
> It is certainly for the interest of all concerned that litigation by his children over this estate should cease. Nearly thirty years have elapsed since the death . . . and nearly the whole of that period has been spent in litigation by his children over the property disposed of by his will. . . . The interests of the community, no less than the interests of the parties, require that there should be an end of litigation respecting it.[132]

Sitting on the Circuit Court in an admiralty matter where he was free to fashion federal case law, Lamar held that a lien created by state law had the same priority as one created by admiralty law. He supported the decision by appealing to the equal dignity of state and federal property law; but he also sought to avoid the substantive discriminatory impact of a rule that accorded the federal lien priority.[133]

The inconsistency among different rules of construction prevented Lamar from developing a coherent approach to the problem of judicial review of agency decisionmaking.[134] His faith in the transparency of language led him to reject deference to agency interpretation,[135] without fully acknowledging that diverse interpretations challenged his underlying faith. Yet—perhaps, significantly, in a case stemming from the Interior Department which Lamar had recently headed—Lamar observed, "[t]he construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons."[136]

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[132] Albright v. Oyster, 140 U.S. 493, 514 (1891). The broader standard of review in equity and substantive equity principles may explain why Lamar seems to have been slightly more ready to reverse decisions below in suits in equity. This was true, ironically, also where equity jurisdiction was exercised too broadly. In Johnson v. St. Louis, Iron Mountain & Southern R.R., 141 U.S. 602 (1891) (Lamar, J., dissenting), Lamar dissented from a decision that enjoined a judgment creditor from enforcing a judgment against a defendant railroad. *Johnson*, 141 U.S. at 612. He wrote that such equity jurisdiction should be exercised only in a narrow category of extraordinary cases. *Id.*

[133] *See The Madrid*, 40 F. 677 (C.C.E.D. La. 1889). In the opinion, Lamar wrote:

> [T]he rule preferring a foreign to a domestic material-man seems to me to discriminate unjustly against the latter . . . . [A court] would be bound to exclude its own citizens for the benefit of citizens of another state. It would seem that if, in reason, any distinction should be made by a court in a conflict between citizens of different states having claims of equal merit, in the abstract, the duty of the court ought to be to take care of, at least not to discriminate against, the citizens of the state in which the court is holden.

The Madrid, 40 F. at 682.

Lamar's career was dogged by ill health, and he died in 1893 during a trip home. His remains were brought to Oxford in 1894.

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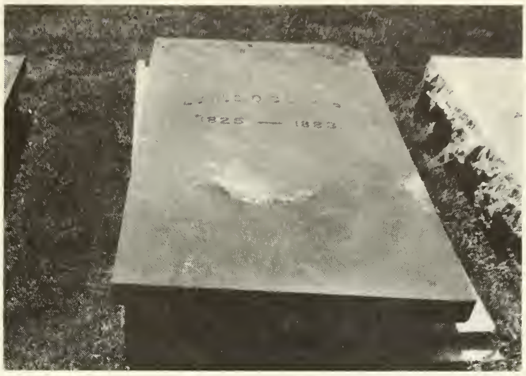
[134] Apparently because of his administrative experience, Lamar was assigned a number of cases involving land grants and other issues that he acquired familiarity with as Secretary of the Interior. In one case he authored an opinion reversing a state supreme court decision that conflicted with an administrative decision that he had made as Secretary. Knight v. United States Land Assoc., 142 U.S. 161, 195-96 (1891) (Field, J., concurring) (identifying Lamar's role in past case history); *see* Heath v. Wallace, 138 U.S. 573 (1891) (construing federal statute in conformity with Interior Department practice in resolving land title dispute); Hastings & Dakota R.R. v. Whitney, 132 U.S. 357, 366 (1889) (construing effect of cancellation of homestead entry); Clement v. Packer, 125 U.S. 309, 320 (1888) (construing legal effect of surveys in land title dispute).

[135] *See* Merritt v. Cameron, 137 U.S. 542, 551-52 (1890) ("A regulation of a department, however, cannot repeal a statute; neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time.").

[136] Heath v. Wallace, 138 U.S. 573, 582 (1891); *accord* Hastings & Dakota R.R., 132 U.S. at 366. Lamar found that the delegation of certain criminal rulemaking powers to the Secretary of War were constitutionally valid. In *United States v. Breen* he wrote:

> If the law empowered the secretary of war, by rule or regulation, to make a certain act criminal, and punishable as such, then this prosecution would not be maintainable; but it is not the rule and regulation which declares the violation thereof a crime, and punishable. All that the secretary is authorized to do is to make the rule and regulation. It is the act of congress which declares that the unlawful and willful violation of such rule and regulation, after it is promulgated, shall be held a misdemeanor . . . .

United States v. Breen, 40 F. 402, 403 (C.C.E.D. La. 1889).



Lamar's Grave in Oxford
Photograph by Richard L. Barnes

D. Note on the Selected Lamar Texts

The selection of speeches, articles, and opinions that are published here in honor of the centennial of Lamar's death constitutes a small part of the rich legacy of works that he authored. In order to represent the diversity of his production, three speeches, one article, and opinion are reproduced. His famous speeches on the abolitionist Senator Charles Sumner (1874) and General Grant (1881) illustrate the central role that Lamar assumed after the war in reconciling the South to a participation in a new federal government. The speeches also demonstrate the power of Lamar as a speaker and evidence the character of courage and integrity for which he was celebrated. His speech on national aid to education (1884) contains one of his most personal and forceful expressions of the role of government. The article on black voting rights in 1879 illustrates both the thoughtful and equivocal character of Lamar's defense of black civil rights. His most famous opinion, the dissent in *In re Neagle*, is also included.

II. SELECTED SPEECHES AND ARTICLES

A. *Eulogy in the House on Charles Sumner (1874)*[137]

Mr. Speaker, in rising to second the resolutions just offered, I desire to add a few remarks which have occurred to me as appropriate to the occasion. I believe that they express a sentiment which pervades the hearts of all the people whose Representatives are here assembled. Strange as in looking back upon the past the assertion may seem, impossible as it would have been ten years ago to make it, it is not the less true that to-day Mississippi regrets the death of CHARLES SUMNER and sincerely unites in paying honors to his memory. Not because of the splendor of his intellect, though in him was extinguished one of the brightest of the lights which have illustrated the councils of the Government for nearly a quarter of a century; not because of the high culture, the elegant scholarship, and the varied learning which revealed themselves so clearly in all his public efforts as to justify the application to him of Johnson's felicitous expression "he touched nothing which he did not adorn;" not this, though these are qualities by no means, it is to be feared, so common in public places as to make their disappearance, in even a single instance, a matter of indifference; but because of those peculiar and strongly marked moral traits of his character which gave the coloring to the whole tenor of his singularly dramatic public career; traits which made him for a long period to a large portion of his countrymen the object of as deep and passionate a hostility as to another he was one of enthusiastic admiration, and which are not the less the cause that now unites all these parties, ever so widely differing, in a common sorrow to-day over his lifeless remains.

It is of these high moral qualities which I wish to speak; for these have been the traits which in after years, as I have considered the successive acts and utterances of this remarkable man, fastened most strongly my attention, and impressed themselves most forcibly upon my imagination, my sensibilities, my heart. I leave to others to speak of his intellectual superiority, of those rare gifts which nature had so lavishly endowed him, and of the power to use them which he had acquired by education. I say nothing of his vast and varied stores of historical knowledge, or of the wide extent of his reading in the elegant literature of ancient and modern times, or of his wonderful power of retaining what he had read, or of his readiness in drawing upon these fertile resources to illustrate his own arguments. I say nothing of his eloquence as an orator, of his skill as a logician, or of his powers of fascination in the unrestrained freedom of the social circle, which last it was my misfortune not to have experienced. These, indeed, were the qualities which gave him eminence not only in our country but throughout the world; and which have made the name of CHARLES SUMNER an integral part of our nation's glory. They were the qualities which gave to those moral traits of which I have spoken the power to impress themselves upon the history of the age and of civilization itself; and without which those traits, however intensely developed, would have exerted no influence beyond the personal circle immediately surrounding their possessor. More eloquent tongues than mine will do them justice. Let me speak of the characteristics which brought the illustrious Senator who has just passed away into direct and bitter antagonism for years with my own State and her sister States of the South.

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[137] L.Q.C. Lamar, Speech to the United States House of Representatives (April 27, 1874), 43d Cong., 1st Sess., 6 CONG. REC. 3410-11 (1874). The text of the speech is also reprinted in MAYES, *supra* note 4, at 184-87.

CHARLES SUMNER was born with an instinctive love of freedom, and was educated from his earliest infancy to the belief that freedom is the natural and indefeasible right of every intelligent being having the outward form of man. In him in fact this creed seems to have been something more than a doctrine imbibed from teachers, or a result of education. To him it was a grand intuitive truth inscribed in blazing letters upon the tablet of his inner consciousness, to deny which would have been for him to deny that he himself existed. Along with this all-controlling love of freedom, he possessed a moral sensibility keenly intense and vivid, a conscientiousness which would never permit him to swerve by the breadth of a hair from what he pictured to himself as the path of duty. Thus were combined in him the characteristics which have in all ages given to religion her martyrs and to patriotism her self-sacrificing heroes.

To a man thoroughly permeated and imbued with such a creed, and animated and constantly actuated by such a spirit of devotion, to behold a human being or a race of human beings restrained of their natural rights to liberty, for no crime by him or them committed, was to feel all the belligerent instincts of his nature roused to combat. The fact was to him a wrong which no logic could justify. It mattered not how humble in the scale of rational existence the subject of this restraint might be, how dark his skin, or how dense his ignorance. Behind all that lay for him the great principle that liberty is the birthright of all humanity, and that every individual of every race who has a soul to save is entitled to the freedom which may enable him to work out his salvation. It matters not that the slave might be contented with his lot; that his actual condition might be immeasurably more desirable than that from which it had transplanted him; that it gave him physical comfort, mental and moral elevation and religious culture not possessed by his race in any other condition; that his bonds had not been placed upon his hands by the living generation; that the mixed social system of which he formed an element had been regarded by the fathers of the Republic, and by the ablest statesmen who had risen up after them, as too complicated to be broken up without danger to society, itself, or even to civilization; or finally, that the actual state of things had been recognized and explicitly sanctioned by the very organic law of the Republic. Weighty as these considerations might be, formidable as were the difficulties in the way of the practical enforcement of his great principle, he held none the less that it must sooner or later be enforced, though institutions and constitutions should have to give way alike before it. But here let me do this great man the justice which amid the excitements of the struggle between the sections, now past, I may have been disposed to deny him. In this fiery zeal and this earnest warfare against the wrong, as he viewed it, there entered no enduring personal animosity toward the men whose lot it was to be born to the system which he denounced.

It has been the kindness of the sympathy which in these later years he has displayed toward the impoverished and suffering people of the Southern States that has unveiled to me the generous and tender heart which beat beneath the bosom of the zealot, and has forced me to yield him the tribute of my respect, I might even say of my admiration. Nor in the manifestation of this has there been anything which a proud and sensitive people, smarting under a sense of recent discomfiture and present suffering, might not frankly accept, or which would give them just cause to suspect its sincerity. For though he raised his voice as soon as he believed the momentous issues of this great military conflict were decided in behalf of amnesty to the vanquished, and though he stood forward ready to welcome back as brothers and to re-establish in their rights as citizens those whose valor had so nearly riven asunder the Union which he loved, yet he always insisted that the most ample protection and the largest safeguards should be thrown around the liberties of the newly enfranchised African race. Though he knew very well that of his conquered fellow-citizens of the South by far the larger portion, even those who most heartily acquiesced in and desired the abolition of slavery, seriously questioned the expediency of investing in a single day and without any preliminary tutelage so vast a body of inexperienced and uninstructed men with the full rights of freemen and voters, he would tolerate no half-way measures upon a point to him so vital.

Indeed, immediately after the war, while other minds were occupying themselves with different theories of reconstruction, he did not hesitate to impress most emphatically upon the administration, not only in public, but in the confidence of private intercourse, his uncompromising resolution to oppose to the last any and every scheme which should fail to provide the surest guarantees for the personal freedom and political rights of the race which he had undertaken to protect. Whether his measures to secure this result showed him to be a practical statesman or a theoretical enthusiast is a question on which any decision we may pronounce to-day must await the inevitable revision of posterity. The spirit of magnanimity, therefore, which breathes in his utterances and manifests itself in all his acts affecting the South during the last two years of his life, was as evidently honest as it was grateful to the feelings of those to whom it was displayed.

It was certainly a gracious act toward the South—though unhappily it jarred upon the sensibilities of the people at the other extreme of the Union and estranged from him the great body of his political friends—to propose to erase from the banners of the national Army the mementoes of the bloody internecine struggle, which might be regarded as assailing the pride or wounding the sensibilities of the southern people. That proposal will never be forgotten by that people so long as the name of CHARLES SUMNER lives in the memory of man. But while it touched the heart of the South and elicited her profound gratitude, her people would not have asked of the North such an act of self-renunciation.

Conscious that they themselves were animated by devotion to constitutional liberty, and that the brightest pages of history are replete with evidences of the depth and sincerity of that devotion, they can but cherish the recollections of sacrifices endured, the battles fought and the victories won in defense of their hapless cause. And respecting, as all true and brave men must respect, the martial spirit with which the men of the North vindicated the integrity of the Union and their devotion to the principles of human freedom, they do not ask, they do not wish, the North to strike the mementos of her heroism and victory from either records or monuments or battles-flags. They would rather that both sections should gather up the glories won by each section, not envious, but proud of each other, and regard them a common heritage of American valor.

Let us hope that future generations, when they remember the deeds of heroism and devotion done on both sides, will speak not of northern prowess or southern courage, but of the heroism, fortitude, and courage of Americans in a war of ideas—a war in which each section signalized its consecration to the principles, as each understood them, of American liberty and of the Constitution received from their fathers.

It was my misfortune, perhaps my fault, personally never to have known this eminent philanthropist and statesman. The impulse was often strong upon me to go to him and offer him my hand and my heart with it, and to express to him my thanks for his kind and considerate course toward the people with whom I am identified. If I did not yield to that impulse it was because the thought occurred that other days were coming in which such a demonstration might be more opportune and less liable to misconstruction. Suddenly, and without premonition, a day has come at last to which, for such a purpose, there is no to-morrow.

My regret is therefore intensified by the thought that I failed to speak to him out of the fullness of my heart while there was yet time.

How often is it that death thus brings unavailingly back to our remembrance opportunities unimproved; in which generous overtures, prompted by the heart, remain unoffered; frank avowals which rose to the lips remain unspoken; and the injustice and wrong of bitter resentments remain unrepaired! CHARLES SUMNER in life believed that all occasion for strife and distrust between the North and South had passed away, and there no longer remained any cause for continued estrangement between these two sections of our common country. Are there not many of us who believe the same thing? Is not that the common sentiment, or if it is not ought it not to be, of the great mass of our people North and South? Bound to each other by a common Constitution, destined to live together under a common Government, forming unitedly but a single member of the great family of nations, shall we not now at last endeavor to grow *toward* each other once more in heart as we are already indissolubly linked to each other in fortunes? Shall we not, over the honored remains of this great champion of human liberty, this feeling sympathizer with human sorrow, this earnest pleader for the exercise of human tenderness and charity, lay aside the concealments which serve only to perpetuate misunderstandings and distrust, and frankly confess that on both sides we most earnestly desire to be one; one not merely in political organization; one not merely in identity of institutions; one not merely in community of language and literature and traditions and country; but, more and better than all that, one also in feeling and in heart? Am I mistaken in this?

Do the concealments of which I speak still cover animosities which neither time nor reflection nor the march of events have yet sufficed to subdue? I cannot believe it. Since I have been here I have watched with anxious scrutiny your sentiments as expressed not merely in public debate, but in the *abandon* of personal confidence. I know well the sentiments of these my southern brothers, whose hearts are so infolded that the feeling of each is the feeling of all; and I see on both sides only the seeming of a constraint which each apparently hesitates to dismiss. The South—prostrate, exhausted, drained of her life-blood as well as of her material resources, yet still honorable and true—accepts the bitter award of the bloody arbitrament without reservation, resolutely determined to abide the result with chivalrous fidelity; yet, as if struck dumb by the magnitude of her reverses, she suffers on in silence.

The North, exultant in her triumph and elated by success, still cherishes, as we are assured, a heart full of magnanimous emotions toward her disarmed and discomfited antagonist; and yet, as if mastered by some mysterious spell, silencing her better impulses, her words and acts are the words and acts of suspicion and distrust.

Would that the spirit of the illustrious dead whom we lament to-day could speak from the grave to both parties to this deplorable discord in tones which should reach each and every heart throughout this broad territory, "My countrymen, *know* one another, and you will *love* one another."

B. Senate Speech in Support of Placing Grant on the Retired List of the Army (1881)[138]

Mr. President, I am in favor of having this bill disposed of; and when it is called up for action I shall vote to place General Grant upon the retired list of the Army.

Had General Grant at any time when he was General desired to be retired from the command of the Army, I presume no one would have objected to the liberal provision proposed in this bill. It is the policy, in my opinion the proper policy, which the Government has adopted for its generals, its admirals, and its judges. It means that such officers shall devote their lives to the discharge of their great duties, and that in return the country shall secure them honorable and adequate independence. So far from objecting to the principle, I am willing to extend it. But the people of the United States did not give General Grant the opportunity of retiring. They summoned him to abandon his place of professional eminence in order to become President. Whatever may be my opinion as to the political administration of General Grant, I do not think his consent to the expressed wish of his country ought to deprive him of the provision which is secured to those who served in the Army with him and after him.

I would with great pleasure vote for a law by which every President, upon closing his administration, should be placed upon the retired list, with such allowances as are fitting for the rank of Commander-in-Chief of the Army and Navy given him by the Constitution. I think it eminently proper that a President should retire from active politics, and equally proper that he should be able to live in quiet independence. The proposition that I see urged in some of the journals and magazines, that an ex-President should be given a seat in the Senate, seems to me anomalous. The Senate is the representative of States. Equality of representation is guaranteed, and a Senator not representing a State would have no life under the Constitution. But I do not propose to discuss any general plan. If I would have voted to retire General Grant at his own request from active service, if I would have done this after eight years' administration of the Presidency, I do not see why I should not vote for it now. I cannot consider this a question of any political consequence. It involves no breach of the Constitution to pass it; it will be the violation of no constitutional duty to reject it. As it is presented, I am willing to consider it the expression of a popular wish that the general most eminent in a war which a majority of the American people do, as we all know, regard as sacred in its motives and as important in its consequences as the war of the Revolution, should be secured an honorable competence at the close of long and arduous service.

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[138] L.Q.C. Lamar, Speech to the United States Senate (January 25, 1881), 46th Cong., 3d Sess., 46 CONG. REC. at 901-02 (1881). The speech is also reprinted in MAYES, *supra* note 4, at 738-39. Lamar was the only Democrat in the Senate to support this bill. *See* MURPHY, *supra* note 4, at 223.

Nor do I see any sectional feature in this measure. It threatens danger to no southern interest; it does not impair any southern right; it ought not to be considered as wounding any southern sentiment. I am willing to accept the popular appreciation of General Grant as a great soldier, and acquiesce cheerfully in this method of its expression. But I cannot vote for this bill unless the second section is stricken out. There are many grave and insuperable objections to it which I will not here present I will state one. It seems to me to be in violation of the principle upon which the retirement of officers rests. It interferes with the actual, proper administration of the active service, and will not by its omission in the slightest degree diminish the honor or justice of the position assigned.

Without any reference to the principles involved in General Grant's administration of the National Government, without any reference to the merits of the strategy of his military campaign, I am in favor, as was done with those who had completed their service under the Roman eagles, of writing opposite the name of General Ulysses S. Grant—*Emeritus*.

C. Senate Speech on National Aid to Education (1884)[139]

Mr. President, I shall detain the Senate only a few moments, not with the expectation of adding anything new to the arguments that have been advanced on this subject, but simply to state my own reasons for the vote which I shall give. I have bestowed upon the constitutional question involved in this measure the study which its importance deserves. I shall not go over the ground already occupied by the Senator from Florida [Mr. JONES], the Senator from Arkansas [Mr. GARLAND], and the Senator from Alabama [Mr. PUGH], nor will I recite the imposing authorities arrayed by the Senator from Georgia [Mr. BROWN]. I have no doubt about the constitutional authority of Congress to pass this measure. Indeed, if we should reject it on the ground that it is unconstitutional for Congress to give aid to the States in the exercise of their exclusive jurisdiction over the education of their people, we would be reversing the settled policy of this Government.

. . . .

I . . . do not intend . . . to repeat the argument which has been forcibly presented in support of the constitutionality of this measure. I do not see any entering-wedge, as it is called, in this bill toward Federal intervention in the jurisdiction of the State over the education of its children, and if there exists any such tendency in the public mind, in my opinion the passage of this bill will arrest it.

Nor do I see any dangerous precedent in it. I do not think it is wise or just reasoning to say that a thing that is right in itself, beneficent in its objects, may be in the future perverted into a wrong, nor do I anticipate it. I have watched the progress of this scheme from the time it was first introduced into the other House, many years ago, down to the present time, when it has taken its present shape as presented by the Senator from New Hampshire. I have watched it with deep interest and intense solicitude. In my opinion it is the first step and the most important step that this Government has ever taken in the direction of the solution of what is called the race problem, and I believe it will tell more powerfully and decisively upon the future destinies of the colored race in America than any measure or ordinance that has yet been adopted in reference to it—more decisively than either the thirteenth, fourteenth, or fifteenth amendments, unless it is to be considered, as I do consider it, the logical sequence and the practical continuance of those amendments.

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[139] L.Q.C. Lamar, Speech to the United States Senate (March 28, 1884), 48th Cong., 1st Sess., 67 CONG. REC. 2368-71 (1884). The speech is also reprinted in MAYES, *supra* note 4, at 774-79.

I think that this measure is fraught with almost unspeakable benefits to the entire population of the South, white and black. Apart altogether from the material aid—and that cannot be overvalued—apart from the contribution of this bounteous donation of money, it will give an impulse to the cause of common-school education in that section which will tell on the interests of the people through the long coming future. It will excite a new interest among our people; it will stimulate both State and local communities to more energetic exertions and to greater sacrifices, because it will encourage them in their hopes in grappling and struggling with a task before whose vast proportions they have stood appalled in the consciousness of the inadequacy of their own resources to meet it.

It is true, as some gentlemen have stated, that before the war the common-school system did not flourish in the South. We had an education there, and an educated people whose culture was as high as that of any people on earth. They were a people, one-fourth of them at least, perhaps, who had all the function and discipline and intellectual development that the finest education could give, not only from their own colleges at home, but from the best universities in America and Europe. It is true that owing to the sparseness of our population and to other causes the common school did not thrive, and there were prejudices against the common school as an efficient means of diffusing education—prejudices they may be called, but such as are now entertained and expressed by some of the ablest writers in the North. Be that as it may, though the common-school education did not prevail in that section, to as great an extent as in other parts of the country, they were a better educated people than one would imagine from the statistics of illiteracy. They were educated in the school of American citizenship, and they reached a discipline and a maturity of thought and an acquaintance with public and social duties that showed itself in a war in which grand armies stretching nearly across the continent found themselves baffled with alternate victory and defeat, and the fate of this Union held in the balance for four years. No ignorant and debased population could have stood before such a power with such heroic resistance for such a time.

But the result of the war overthrew the conditions of society, and colleges, schools, and academies shared in the general crash and desolation. In that section the educated classes suffered more than all others. They were more impoverished than any other class, and their children more imperiled by falling back into ignorance than any other class; and now the common-school system has become the indispensable factor in diffusing education generally throughout the South.

The people of the South have attempted to meet the emergency. They have rebuilt in a large degree their colleges, academies, and schools in the towns, villages, and cities, and they have made great sacrifices. Although the remark has been made more than once that it is impossible for any except one who lives in their midst to know the extent of the efforts and sacrifices that they have made, I must yet call attention to it here.

Guizot in one of his great speeches once said that the overthrow, prostration, and demolition of the political institutions of a country was equal in the political world to the swallowing up of a city by an earthquake, and that it would be as difficult to reconstruct the one as it would be to resurrect and rebuild the other. Extravagant as the illustration is, we have learned by a costly experience that there is much truth in it. Yet we have made the effort, and our people have taxed themselves and are still taxing themselves at a rate that is equal in some of our States to that of any other section of the Union.

But the progress has been slow, the difficulties have been great, the burden has been grievous, and we stand, I say, almost appalled by the immense obstacles in the way. The generous, wise, and beneficent action of the Government proposed by this measure, as I said before, would reanimate and infuse new hopes in our people; it will be a manifestation of respect and confidence and affection which will draw them into closer relations, if possible, to the Government, and dispel whatever impressions past events have produced that it stands in an attitude of sternness and hostility toward them.

The objection which has been made in the course of the debate that this donation is too large, that the fund is too big and comes too abruptly to be availed of in that section is based upon a misapprehension of facts, and the conclusion is erroneous. There is machinery there fully adequate to the disbursement and application of this fund to the wisest purposes for which it is intended. We have school-house accommodations for far more scholars than have attended or will attend. I speak from positive knowledge when I state to the Senate that there is in the shape of teachers—competent, well educated, full of aspiration for honorable usefulness and distinction in that field—material I believe superior to that in any other section of the Union, for we have not the diversified avenues to careers which you have in other sections.

. . . .

We have, as I said before, school-houses, we have teachers and the material for making teachers. All we need is the money to apply to these ends. We can carry on in the rural districts this instruction for four months in some of the States, as in my own, and in the cities and towns for eight months, but we have not the means for prolonging the tuition. If we had, the blessings of education would be multiplied beyond the mere proportion of the extension of the time, for such is the character of the occupations of our people that they are not able to send their children to school in large numbers at any one time and for any very protracted period. The culture of the cotton crop, especially in the lower portions of the Gulf States, requires nearly all the months in the year. They begin in the early part of the year, sometimes in December of the preceding year, to bed up the land; the field work goes on until July, when we have a short vacation through August into September, and then the children go in larger numbers to the schools; until about the middle of September, when cotton-picking commences, and continues until Christmas and often later; but if our terms were prolonged, as they would be if we had the means of employing the teachers, there would be all through the year children sent to those schools for short periods, where they are now excluded by the shortness of our present period.

The Senator from Indiana [Mr. HARRISON], in the remarks which he submitted to the Senate yesterday, stated that there was not a child within the limits of that State within the ages prescribed for education who did not have the means to acquire, or at least who could not acquire, the elements of a common-school education. Sir, that remark is as applicable in its fullest, most literal meaning to Mississippi as it is to Indiana. There is not a child in that State from 5 years old to 21, and if he chooses to go after he is 21, who would not be admitted into school should he apply. No matter what his color, he can then find the means of education.

I would regret very much if the amendment offered by one Senator should by its adoption here mar and impair the effect of this bill. I mean the amendment which proposes that the fund shall go into the hands of Federal agencies, and be distributed by them to the exclusion of the State officers. The effect of such an amendment would be a discrimination. It would give to the measure instead of its present generous and beneficent aspect a harsh and ungracious look and effect.

Senators have expressed the opinion that this fund will not be fairly administered, that such is the prejudice of race, that such is the darkening influence of slavery, that with the best intention our people and officials are incapable of administering this fund equally and equitably to all.

I say that I should regret the adoption of such an amendment for the reason that it would change the entire aspect and character of this bill and show that this Government intended to keep up discriminations; that while it is animated with a desire to benefit and improve and elevate and edify one race, it looks upon the other as an object of distrust and suspicion. It would be the enactment of the color line.

. . . .

Mr. President, the surest way to make a people worthy of trust is to trust them; and the surest mode of producing alienation and making them stand aloof in sullen opposition or perhaps active obstruction and antagonism upon such a subject as this is to treat them as objects of distrust and disapprobation and to manifest toward them a want of confidence which they feel they do not deserve. I say with entire confidence that this distrust is not deserved; that Senators are mistaken as to the state of feeling in the South with reference to the education of the negro. The people of the South find that the most precious interests of their society and civilization are bound up in the question of his education, of his elevation out of his present state of barbarism. I shall enter into no argument upon that subject.

> [Lamar read from a number of northern writers who praised efforts in the South to educate whites and blacks.]

I have no further extracts to read upon this subject. My object has been not to recriminate or even to repel, but simply to adduce testimony of an incontrovertible character to convince honorable Senators upon this floor that their apprehensions upon this subject are needless and that the precautions which they would take are useless.

I would regret the proposed amendment for more reasons than those I have given. It would impair the working of the common-school system of the South, or of any other section of the country, to introduce two sets of agencies in its administration. Instead of being a harmonious co-operation of State organization and national aid there would be perhaps an antagonism, certainly disconnected effort and discordant forces. There would be both time and money spent, which if you used a single agency under the present system already occupying the ground would be concentrated in one harmonious effort. Besides, as it is now, the agencies which this bill selects are the agencies which are amenable to the public opinion and the restraining moral sentiment of the people among whom they will operate, whereas the other would be in the hands of comparative strangers who would have no relation to the constituency in which they were working and would be uninfluenced by the supervision of the people at home. They would be responsible to no one there, to no restraining public sentiment, but simply to the appointing power at a great distance, too often governed by political considerations instead of the interests intrusted to them.

I said at the beginning of these remarks (and I have protracted them much further than I intended) that in my opinion this bill is a decided step toward the solution of the problem of race. The problem of race in a large part is the problem of illiteracy. Most of the evils, most of the difficulties which have grown up out of that problem have arisen from a condition of ignorance, prejudice, and superstition. Remove these, and the simpler elements of the question will come into play with a more enlightened understanding and a more tolerant disposition. I will go with those who will go farthest in this matter.

Liberty can not be manufactured by statutes or constitutions or laws. It is a moral and intellectual growth. It is the outgrowth of men's natures and feelings, and passions, and instincts, and habits of thought. A people who remain ignorant and superstitious and debased can not be made free by all the constitutional guarantees and statutes that you surround them with. You may force power upon them and subject others to their rule, but the great attribute of self-government and that real liberty which comes from it you can not confer on them while they remain ignorant and in bondage to their own passions and to their own prejudices and superstitions.

Sir, in my opinion institutions and laws and governments and all the fixed facts of society are but the material embodiment of the thought of a people and the substantial expression of their inner life; and liberty, which is the culmination of them all, is a boon that can not be conferred upon men, but to be permanently possessed and enjoyed must be earned, as the reward of the development of our moral and intellectual faculties.

> No State stands sure but on the ground of right,
> Of virtue, knowledge, judgment to preserve,
> And all the powers of learning requisite.

Mr. President, no one has the right to predict that this or any class of people will not rise to that plane of intelligence and moral elevation necessary to the enjoyment of this great blessing and therefore refuse to vote for a measure like this which proposes to aid them in their effort to emerge from that condition which centuries of barbarism have entailed upon them. For my part, I say that I would leave no legitimate effort unused and no constitutional means unemployed which would give to every human being in this country that highest title of American citizenship—virtue, knowledge, and judgment.

I am not an optimist as to the rapid progress of the black people in education. However earneast they may be, there will be great difficulty even with the aid of the Federal Government in establishing effective schools for all. We are yet but in the incipience of this great work; hardly gone further than establishing the educational machinery on the ground. A task of colossal magnitude is before us, and a dense mass of ignorance has to be penetrated. But, sir, whatever of disappointment may attend it, whatever of failure, whatever of error and mistake and even abuses of trust may cripple and embarrass this movement, the great idea of popular education which has animated the North, and is animating the South, and in which this bill has originated, will inspire both to guard and guide the vast host in its slow, hesitating, but onward advance to knowledge and true freedom.

Mr. HARRISON:

Mr. President, I understood [Senator Lamar] . . . to say that his own State was as well supplied with competent, well-equipped teachers to take charge of the common schools as any State in the Union, perhaps better supplied by reason of the fact that there were not there so many avenues into which the enterprising and talented and educated could go.

Now, Mr. President, I desire simply, in response, to read from the report of the superintendent of schools for the State of Mississippi for the year 1880-'81 his statement as to the condition of the supply of teachers in that State. He says: "The State is sadly in demand of educated and trained teachers in her public schools . . . ."

. . . .

So, then, it seems, upon the testimony of that officer of Mississippi who is charged with the duty of superintending the schools, that there is now an inadequate supply of competent teachers to teach the schools that are at present established in that State. That is all I desire to say.

Mr. LAMAR:

Just one word in reply to [Senator Harrison]. I admit that the quotation is perfectly appropriate to my remarks, but I speak from a knowledge equal to that of the superintendent of public education in Mississippi in reiterating my statement; and it is not inconsistent with the one which has just been read. There is an inadequate supply of competent teachers in view of the limited revenues for the purpose of employing them in that State. You can not command such teachers with the small salary that we are compelled to give to them, for the short period of time we employ them, from the State revenue that we raise by our taxation; and it is true of other States. I know something about this difficulty, for I have been connected with the education of the youth of the South, and I say that there is no State and no society composed of more cultivated, upright, and ambitious young men, with trained faculties and with ambition to excel in this department of teaching, than the State of Mississippi; but at the very inadequate remuneration which is given to teachers on account of the limited resources of the State and local communities they are forced to seek other vocations as a livelihood.

D. *Article on Black Voting Rights (1879)*

"OUGHT THE NEGRO TO BE DISFRANCHISED?—OUGHT HE HAVE BEEN ENFRANCHISED?"[140]

Mr. LAMAR:

The precision with which Mr. Blaine states his premises and the unimpassioned spirit in which he draws his conclusions render the discussion which he proposes both possible and profitable. His statement itself deprives the issue of nearly all its difficulty and danger. He lays down with force and clearness his propositions:

1. That the disfranchisement of the negro is a political impossibility under any circumstances short of revolution.

2. That the ballot in the hands of the negro, however its exercise may have been embarrassed and diminished by what he considers, erroneously, a general Southern policy, has been to that race a means of defense and an element of progress.

I agree to both propositions. In all my experience of Southern opinion I know no Southern man of influence or consideration who believes that the disfranchisement of the negro on account of race, color, or former condition of servitude, is a political possibility. I am not now discussing the propriety or wisdom of universal suffrage, or whether in the interests of wise, safe, and orderly government all suffrage ought not to be qualified. What I mean to say is, that universal suffrage being given as the condition of our political life, the negro once made a citizen cannot be placed under any other condition. And in this connection it may surprise some of the readers of this discussion to learn that in 1869 the white people of Mississippi unanimously voted at the polls in favor of ratifying the enfranchising amendment for which Mr. Blaine voted in Congress—believing, as they did, that when once the negro was made a free man, a property-holder, and a tax-payer, he could not be excluded from the remaining privilege and duty of a citizen, the right and obligation to vote. And I think I can safely say for that people what Mr. Blaine says for himself, that, if the question were again submitted to their judgment, they "would vote for negro suffrage in the light of experience with more confidence than they voted for it in the light of an experiment."

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[140] L.Q.C. Lamar, *Ought the Negro to be Disfranchised? Ought he to have been Enfranchised?*, *in* 268 N. AM. REV. 128, 225-39 (1879). The use of the masculine pronoun in the title was intentional, of course, because black women were not enfranchised by federal law until 1920. U.S. CONST. amend. XIX.

I concur also in the second proposition, that the ballot has been in the hands of the negro both a defense and an education; and I am glad to find this important truth recognized so fully by Mr. Blaine. We might possibly differ as to the extent to which the defense was needed, or as to the progress which has been made in the education. But enough would remain for substantial agreement. There can be no doubt that in the unaccustomed relation into which the white and colored people of the South were suddenly forced there would have been a natural tendency on the part of the former masters, still in possession of the land and of the intelligence of the country, and of its legislative power, to use an almost absolute authority and to develop the new freedman according to their own idea of what was good for him. This would have resulted in a race distinction, with such incidents of the old system as would have discontented the negro and dissatisfied the general opinion and sentiment of the country. If slavery was to be abolished, it must, I think, be admitted that there could be nothing short of complete abolition, free from any of the affinities of slavery; and this would not have been effected so long as there existed any inequality before the law. The ballot was, therefore, a protection of the negro against any such condition, and enabled him to force his interests upon the legislative consideration of the South.

What I do not think Mr. Blaine fully realizes, or makes due allowance for, is that this sudden transformation, social and political, would necessarily produce some jar in its practical operation, and that its successful working could be effected only by experienced and conscientious men acting on both sides with good sense and good temper. Conquest on either side only complicated the problem. Its only solution was a sagacious and kindly cooperation of all the social forces. The vote in the hands of the negro should have been genuinely "a defense," not a weapon of attack.

The proper use of this defensive power, and its growth into a means of wholesome and positive influence upon the character and interests of the country, could only be attained by the education of the negro. And I agree fully with Mr. Blaine that his practical use of the ballot was an important part of that education. I am willing to accept the present condition of the South as the result of that practical education. Will he? I say that the negro has been using this defense for ten years, that in this time hundreds of thousands of negroes, born free, have grown to manhood under the experience of a political life as open to them as to the old, white governing race; and Mr. Blaine himself asserts that education has been more generally diffused among the youth of the colored race than among the poorer classes of the whites—whether truly or erroneously we will not here discuss—and the result is, that throughout the South the races vote together; that they have learned where their mutual interest lies; and that, whom God has joined, all the politicians have failed to keep asunder.

I have his essay before me. He denies that this is a legitimate result. He insists that the facts prove that the negro vote has been cheated by fraud or defeated by force, and that the present condition of Southern politics is an unnatural result. I am willing to meet this issue on his own principles. I will indulge in neither invective nor denunciation. I will simply take the late government of South Carolina or of Louisiana, or of other States under similar rule, and describe it in language that Mr. Blaine may himself select. When he has told its history I will ask him whether he would willingly, as a patriotic American, desire to see his own State, or any other of the free States, reduced to such a level? I am not afraid of his answer, or that of any man who has been bred under the traditions of a virtuous civilization.

Then I will say to him: This, it is true, is a painful result; but, when you put the ballot in the hands of an ignorant negro majority as a means of education and progress, you must be patient while they learn their lesson. We of the South have borne all this, because we know that the reaction must come. It has come. The results which you see to be so bad the negro has seen also. He has come back to us with the same blind impulse with which a few years ago he fled from us. He may be as ignorant a Democrat as he was an ignorant Republican, but years must yet pass before the ballot will have educated him fully into self-reliant, temperate citizenship; and what we of the South have borne, our friends of the North must bear with us, until the negro has become what we both want to make him. This is part of his education. By a system, not one whit less a system of force or of fraud than that alleged to exist now, he was taken away from his natural leaders at the South, and held to a compact Republican vote. Granting—which I do not grant—that the present methods are as bad as those then applied, the fault lies in the character of the vote. It is not educated to free action, and we must educate it to what it ought to be. Take the history of the race, as stated by Mr. Blaine himself, and is there not progress, astonishing progress, when the material with which we are dealing is considered? Force and fraud have been freely charged. Suppose it granted. Could any one expect, did any one expect, that such a tremendous political and social change—the sudden clothing of four million slaves with suffrage and with overruling political power—could be made without violent disturbance and disorder? Had any such change ever been made in any free State without convulsion? Was it to be expected that, when the capital and character of a State were placed at the mercy of a numerical majority of ignorant and poverty-stricken voters, it would present a model of peace and order?

But all this while the ballot has been educating the negro. He has learned that he was a power between Republican and Democrat. He is now learning rapidly that at the South he is a power between Democrat and Democrat, and in the late election he made that power felt in the result. I would have preferred a much less costly tuition; but, such as it is, it has been paid for, and, if Mr. Blaine will patiently trust his own theory, he will find the ballot in the hands of the negro the best defense and the best educator. But, as the South has been patient, so must he be patient. As the South has chafed ineffectually when that vote was all against her white people, so will he chafe ineffectually when it is now largely for them.

In his perplexity over the sudden change in the vote of the negro, Mr. Blaine has forgotten that, at this stage of its progress, the negro vote can not intelligently direct itself. It must and will follow some leader. Now, up to 1876 the Republican party, armed with all the authority of the Federal Government, supplied those leaders. They were strangers in the States they governed. The moment that the compact vote upon which their power rested was divided, they abandoned their places, and in almost every case left the State in which they had ruled. The great mass of colored voters was left without guides. In many of the largest counties, where their majority was absolute, they were not only not organized, but there was not interest enough to print a Republican ticket. The weapon of defense which had been given to the negro was thrown away by his leaders in their flight, and Mr. Blaine can scarcely complain if it was picked up by the Democrats. In saying this I do not wish to provoke or renew useless and irritating controversies; but Mr. Blaine's position is, that not only the negro ought not to be disfranchised, but that such a question could never have suggested itself but for an illegal control of the negro vote by Southern Democrats. My view is that, while the enfranchisement of the negro was a political necessity, it could not be effected without subjecting the country to such dangerous political aberrations as we have experienced; that a wise man would have foreseen them; and that, in fact, they have been less than could reasonably have been anticipated; that the ballot in the hands of the negro has been a protection and an educator; that with it he has been stronger and safer in all his rights than the Chinese have been in California without it; and that the problems it raised are steadily and without danger solving themselves through the process of local self-government.

. . . .

The question, then, recurs—conceding, for the sake of argument, that in the South political rule represents not the will of mere numbers, but the intellectual culture, the moral strength, the material interests, the skilled labor, the useful capital of that entire section, as well as its political experience—is not this result exactly what the intelligence, character, and property of the country are striving to effect in every Congressional district in the Union, and is it not a perfectly legitimate result of placing the ballot in the hands of a population unfamiliar with its use, and who are peculiarly susceptible to the influences which property and brains have always exerted in popular government?

I anticipate the answer; it is, that the property and intelligence of the other sections seek to control the votes of the masses by methods that are legitimate and peaceful, while the Southern whites have achieved their power by means which are unlawful and unjust. So far I have to some extent, for the sake of argument, conceded the assumption that the negro vote has been subjected to the forcible control of the white race, but that I deny. Reference has been made to the great change which the election returns show in the negro vote throughout the South. The phenomenon is easily explained. Let any intelligent Northern man review the history of the State governments of the South for the last ten years under Republican rule—their gross and shameless dishonesty, their exorbitant taxation, their reckless expenditure, their oppression of all native interests, the social agonies through which they have forced all that was good and pure to pass as through a fiery furnace; the character of the men—many of them—they have placed in power; and then say if such a state of things in a Northern or Western State would not have been a sure and natural precursor of a Republican defeat, so absolute and complete that the very name of the party would have become in that State a name of scorn and reproach. Then why should not that result have occurred in the South? Are we to assume that the black race have neither instinct nor reason—have no sense, no intelligence, no conscience, no independence; that in every Southern State the thralldom of the negro vote to party leaders, even when abandoned by them, is so unquestioning and abject that no amount of misrule can cut him loose from them or teach him the advantage of a more natural and wholesome political alliance? To reason thus is simply to say that the negro is unfit for suffrage, and to surrender the argument to those who hold that he ought to be disfranchised.

But this is not true. There are many honest, intelligent, and independent men among the negroes in every Southern State. There are thousands of them who own property, who cultivate their own lands, who have taxes to pay, and who appreciate their vital interests in good government. This change in his political relations which has been the subject of so much incredulous comment is the legitimate result of the experience through which he has gone.

So far from proving his weak subordination to a hostile influence, it demonstrates what Mr. Blaine says: that the ballot box indeed educated him to understand his own interest, and that he has learned to use it as an instrument to protect his own rights. To interfere with such a result because it does not square with the necessities or the ambitions of this or that party seems to me to be in direct contradiction to what has been suggested by Mr. blaine himself. He says, "The one sure mode to remand the States that rebelled against the Union to their autonomy was to give suffrage to the negro," leaving (I venture to add) to self-government the evolution of the proper remedies for whatever of evil or error may attend the working out of this grave and critical experiment.

III. SELECTED SUPREME COURT OPINION: *IN RE NEAGLE* (1890) DISSENT[141]

Author's note

This once famous constitutional case has sadly fallen into neglect. It still provides important authority for resolving the problem, for example, of a state's power to prosecute federal Drug Enforcement Administration agents who violate a state's criminal laws against conspiracy, kidnapping, and assault.

The background of the dispute is recounted colorfully by one historian:

> Senator William Sharon of Nevada had a young, dark-haired, lustrous-eyed mistress named Sarah Althea Hill. He grew tired of her and cast her off. She claimed a wife's share of his large estate under a written contract of marriage which, if not forged, made her his wife under California law . . . [T]he federal courts condemned it as a forgery. One basis for this adverse decision was that Miss Hill, during the period when she claimed to be Sharon's wife, had told her friends how she had hidden in his hotel and gleefully described his intimacies with another woman. The federal courts thought that such glee was unwifely.
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> After Senator Sharon's death, but while the litigation was proceeding, she married her lawyer, Judge David S. Terry, a man of great physical prowess, who had killed Senator Broderick of California in a duel. Terry had been a colleage of Justice Field on the Supreme Court of California.
>
> While Field, on circuit in California, was reading an opinion condemning the Sharon-Hill contract as void, Mrs. Terry suddenly shrieked, "You have been paid for this decision." Field calmly ordered the Marshal to remove her. Terry sprang to her aid and in the melee that followed drew a bowie knife which was taken from him with great difficulty by the marshals, one of whom was David Neagle. Field sentenced Judge and Mrs. Terry to jail for contempt. . . .

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[141] 135 U.S. 1 (1890). Footnote omitted explaining that the original docket style was *Cunningham v. Neagle*, by which the case is still occasionally identified.

> While Terry and his wife were in jail, they made many threats against Field, should he return to California.[142]

As the opinion explains, Neagle was assigned to protect Justice Field during a subsequent visit to California. Terry assaulted the justice at breakfast, and Neagle shot and killed him. Terry's widow initiated state murder proceedings, and Neagle petitioned for habeas corpus relief.

Though Terry was unarmed, he had a history of violent assaults (known to the marshal) and had made repeated threats against Justice Field. Accordingly, the federal court found that Neagle had "acted, under the trying circumstances surrounding him, in good faith and with consummate courage, judgment, and discretion. The homicide was . . . justifiable. . . . This being so, and the act having been 'done . . . in pursuance of a law of the United States,' . . . it cannot be an offense against, and the petitioner is not amenable to, the laws of the state."[143]

Field had been appointed to the Supreme Court in 1857, the year Terry became its Chief Justice. (Terry served only two more years, when he resigned in order to challenge Senator Broderick to a fatal duel.)[144]

Mr. JUSTICE MILLER, on behalf of the court, stated the case as follows:

This was an appeal by Cunningham, sheriff of the county of San Joaquin, in the State of California, from a judgment of the Circuit Court of the United States for the Northern District of California, discharging David

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[142] WILLARD L. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES 1888-1910 139-140 (1950).

[143] *In re Neagle*, 14 Sawyer 232 (C.C.N.D. Cal.) (Sept. 16, 1889), *quoted in* CARL BRENT SWISHER, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW 358-59 (1963). Field naturally took no part in *In re Neagle*, as he was not only a witness but had a strong personal and legal interest in the case. Field had been accused of murder in the widow's information, but the intervention of the Governor prevented the execution of the arrest warrant. *In re Neagle*, 135 U.S. at 4 n.1.

[144] CARL B. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 72, 74 (Philip B. Kurland ed., 1969). Field had also served on the court with Joseph G. Baldwin, author of *The Flush Times of Alabama and Mississippi: A Series of Sketches* (1853) (1957 reprint). For Baldwin's appraisal of Field, see JOHN N. POMEROY, SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD AS A LEGISLATOR, STATE JUDGE, AND JUDGE OF THE SUPREME COURT OF THE UNITED STATES 16-19 (Chauncey F. Black & Samuel B. Smith eds., 1986) (1881).

Neagle from the custody of said sheriff, who held him a prisoner on a charge of murder.

On the 16th day of August, 1889, there was presented to Judge Sawyer, the Circuit Judge of the United States for the Ninth Circuit, embracing the Northern District of California, a petition signed David Neagle, deputy United States marshal, by A.L. Farrish on his behalf. This petition represented that the said Farrish was a deputy marshal duly appointed for the Northern District of California by J. C. Franks, who was the marshal of that district. It further alleged that David Neagle was, at the time of the occurrences recited in the petition and at the time of filing it, a duly appointed and acting deputy United States marshal for the same district. It then proceeded to state that said Neagle was imprisoned, confined and restrained of his liberty in the county jail in San Joaquin County, in the State of California, by Thomas Cunningham, sheriff of said county, upon a charge of murder. . . .

The petition then recited the circumstances of a rencontre between said Neagle and David S. Terry, in which the latter was instantly killed by two shots from a revolver in the hands of the former. The circumstances of this encounter and of what led to it will be considered with more particularity hereafter. The main allegation of this petition was that Neagle, as United States deputy marshal, acting under the orders of Marshal Franks, and in pursuance of instructions from the Attorney General of the United States, had, in consequence of an anticipated attempt at violence on the part of Terry against the Honorable Stephen J. Field, a justice of the Supreme Court of the United States, been in attendance upon said justice, and was sitting by his side at a breakfast table when a murderous assault was made by Terry on Judge Field, and in defence of the life of the judge the homicide was committed for which Neagle was held by Cunningham. The allegation was very distinct that Justice Field was engaged in the discharge of his duties as circuit justice of the United States for that circuit, having held court at Los Angeles, one of the places at which the court is by law held, and, having left that court, was on his way to San Francisco for the purpose of holding the Circuit Court at that place. The allegation was also very full that Neagle was directed by Marshal Franks to accompany him for the purpose of protecting him, and that these orders of Franks were given in anticipation of the assault which actually occurred. It was also stated, in more general terms, that Marshal Neagle, in killing Terry under the circumstances, was in the discharge of his duty as an officer of the United States, and was not, therefore, guilty of a murder, and that his imprisonment under the warrant held by Sheriff Cunningham was in violation of the laws and Constitution of the United States, and that he was in custody for an act done in pursuance of the laws of the United States.

. . . .

The hearing in the Circuit Court was had before Circuit Judge Sawyer and District Judge Sabin. . . . A large body of testimony, documentary and otherwise, was submitted to the court, on which, after a full consideration of the subject, the court made the following order:

"In the Matter of David Neagle, on *habeas corpus.*

"In the above-entitled matter, the court having heard the testimony introduced on behalf of the petitioner, none having been offered for the respondent, and also the arguments of the counsel for petitioner and respondent, and it appearing to the court that the allegations of the petitioner in his amended answer or traverse to the return of the sheriff of San Joaquin County, respondent herein, are true, and that the prisoner is in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States, it is therefore ordered that petitioner be, and he is hereby, discharged from custody."

From that order an appeal was allowed which brought the case to this court, accompanied by a voluminous record of all the matters which were before the court on the hearing.

. . . .

Mr. JUSTICE MILLER, after stating the case as above, delivered the opinion of the court.

. . . .

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the sheriff of San Joaquin County.

Mr. JUSTICE LAMAR (with whom concurred Mr. CHIEF JUSTICE FULLER) dissenting.

The Chief Justice and myself are unable to assent to the conclusion reached by the majority of the court.

Our dissent is not based on any conviction as to the guilt or innocence of the appellee. The view which we take renders that question immaterial to the inquiry presented by this appeal. That inquiry is, whether the appellee, Neagle, shall in this *ex parte* proceeding be discharged and delivered from any trial or further inquiry in any court, state or federal, for what he has been accused of in the forms prescribed by the constitution and laws of the State in which the act in question was committed. Upon that issue we hold to the principle announced by this court in the case of *Ex parte Crouch*, 112 U.S., 178, 180, in which Mr. Chief Justice Waite, delivering the opinion of the court, said: "It is elementary learning that, if a prisoner is in the custody of a state court of competent jurisdiction, not illegally asserted, he cannot be taken from that jurisdiction and discharged on *habeas corpus* issued by a court of the United States, simply because he is not guilty of the offence for which he is held. All questions which may arise in the orderly course of the proceeding against him are to be determined by the court to whose jurisdiction he has been subjected, and no other court is authorized to interfere to prevent it. Here the right of the prisoner to a discharge depends alone on the sufficiency of his defence to the information under which he is held. Whether his defence is sufficient or not is for the court which tries him to determine. If, in this determination, errors are committed, they can only be corrected in an appropriate form of proceeding for that purpose. The office of a writ of *habeas corpus* is neither to correct such errors, nor to take the prisoner away from the court which holds him for trial, for fear, if he remains, they may be committed. Authorities to this effect in our own reports are numerous. *Ex parte Watkins*, 3 Pet. 202; *Ex parte Lange*, 18 Wall. 163, 166; *Ex parte Parks*, 92 U.S. 18, 23; *Ex parte Siebold*, 100 U.S. 371, 374; *Ex parte Virginia*, 100 U.S. 339, 343; *Ex parte Rowland*, 104 U.S. 604, 612; *Ex parte Curtis*, 106 U.S. 371, 375; *Ex parte Yarbrough*, 110 U.S. 651, 653."

Many of the propositions advanced in behalf of the appellee and urged with impressive force we do not challenge. We do not question, for instance, the soundness of the elaborate discussion of the history of the office and function of the writ of *habeas corpus*, its operation under and by virtue of section 753 of the Revised Statutes, or the propriety of its use in the manner and for the purposes for which it has been used, in any case where the prisoner is under arrest by a State for an act done "in pursuance of a law of the United States." Nor do we contend that any objection arises to such use of the writ, and based merely on that fact, in cases where no provision is made by the federal law for the trial and conviction of the accused. Nor do we question the general propositions, that the federal government established by the Constitution is absolutely sovereign over every foot of soil, and over every person, within the national territory, within the sphere of action assigned to it; and that within that sphere its constitution and laws are the supreme law of the land, and its proper instrumentalities of government can be subjected to no restraint, and can be held to no accountability whatever. Nor, again, do we dispute the proposition that whatever is necessarily implied in the Constitution and laws of the United States is as much a part of them as if it were actually expressed. All these questions we pretermit.

The recognition by this court, including ourselves, of their soundness does not in the least elucidate the case; for they lie outside of the true controversy. The ground on which we dissent, and which in and by itself seems to be fatal to the case of the appellee, is this: That in treating section 753 of the Revised Statues as an act of authority for this particular use of the writ a wholly inadmissible construction is placed on the word "law," as used in that statute, and a wholly inadmissible application is made of the clause "in custody in violation of the Constitution . . . of the United States."

It will not be necessary to consider these two propositions separately, for they are called into this case as practically one.

The section referred to is as follows:

"The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States," etc.

It is not contended in behalf of the appellee that the writ of *habeas corpus* could be used, as here it is, in any case, without authority of a statute. In *Ex parte Bollman*, 4 Cranch, 75, 94, Chief Justice Marshall said: "The power to award the writ [of *habeas corpus*] by any of the courts of the United States must be given by written law."

It is not contended that there is any statute other than those now found in the Revised Statutes of the United States. Nor is it contended that in those statutes there is any authority for the use here made of the writ other than what is embraced in the clauses above quoted. The issue, as stated above, is thus narrowed to the proper force to be attributed to those clauses.

It is stated as the vital position in appellee's case, that it is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits and act as a body guard to them to defend them against malicious assaults against their persons; that in the view taken of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase; and that it would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there was to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments might operate unfavorably. In considering this position, it is indispensable to observe carefully the distinction between the individual man Neagle, and the same person in his official capacity as a deputy marshal of the United States; and also the individual man whose life he defended, and the same person in his official capacity of a Circuit Justice of the United States.

The practical importance of the distinction between the rights and liabilities of a person in his private character, and the authority and immunity of the same person in his official capacity, is clearly pointed out and illustrated in *United States v. Kirby*, 7 Wall. 482, 486, in which the court says: "No officer or [employee] of the United States is placed by his position, or the services he is called to perform, above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention, when accused of felony, in the forms prescribed by the Constitution and laws." And the court adds: "Indeed, it may be doubted whether it is competent for Congress to exempt the [employees] of the United States from arrest on criminal process from the state courts, when the crimes charged against them are not merely *mala prohibita*, but are *mala in se*. But whether legislation of that character be constitutional or not, no intention to extend such exemption should be attributed to Congress unless clearly manifested by its language."

Now, we agree, taking the facts of the case as they are shown by the record, that the personal protection of Mr. Justice Field, as a private citizen, even to the death of Terry, was not only the right, but was also the duty of Neagle and of any other bystander. And we maintain that for the exercise of that right or duty he is answerable to the courts of the State of California, and to them alone. But we deny that upon the facts of this record, he, as deputy marshal Neagle, or as private citizen Neagle, had any duty imposed on him by the laws of the United States growing out of the official character of Judge Field as a Circuit Justice. We deny that anywhere in this transaction, accepting throughout the appellee's version of the facts, he occupied in law any position other than what would have been occupied by any other person who should have interfered in the same manner, in any other assault of the same character, between any two other persons in that room. In short, we think that there was nothing whatever in fact of an official character in the transaction, whatever may have been the appellee's view of his alleged official duties and powers; and, therefore, we think that the courts of the United States have in the present state of our legislation no jurisdiction whatever in the premises, and that the appellee should have been remanded to the custody of the sheriff.

The contention of the appellee, however, is that it was his official duty as United States marshal to protect the justice; and that for so doing in discharge of this duty, "which could only arise under the laws of the United States," his detention by the state courts brings the case within section 753 of the Revised Statutes, as aforesaid.

We shall therefore address ourselves as briefly as is consistent with the gravity of the question involved, to a consideration of the justice of that claim. We must, however, call attention again to the formal and deliberate admission that it is not pretended that there is any *single* specific statute making it, in so many words, Neagle's duty to protect the justice. The position assumed is, and is wholly, that the authority and duty to protect the justice did arise directly and necessarily out of the Constitution and positive congressional enactments.

The Attorney General of the United States has appeared in this case for the appellee, in behalf of the government; and in order that the grounds upon which the government relies in support of its claim against the State of California that Neagle should be discharged on this writ may fully appear, it is proper to give some of his most important propositions in his own language. He maintains that "it was the duty of the judiciary, having been thus protected by the executive department, to sit in judgment upon and to vindicate the officer of the executive department, if innocent, in the discharge of his duty, because such authority in the federal judiciary is essential in principle to the existence of the nation." "We insist that, by the Constitution of the United States, a government was created possessed of all the powers necessary to existence as an independent nation; that these powers were distributed in three great constitutional departments, and that each of these departments is, by that Constitution, invested with all of those governmental powers naturally belonging to such department which have not been expressly withheld by the terms of the Constitution. In other words, that Congress is invested not only with expressed but with implied legislative powers; that the judiciary is invested not only with expressed powers granted in the Constitution as its share of the government, but with all the judicial powers which have not been expressly withheld from it; and that the President, in like manner, by the very fact that he is made the chief executive of the nation, and is charged to protect, preserve, and defend the Constitution, and to take care that the laws are faithfully executed, is invested with necessary and implied executive powers which neither of the other branches of the government can either take away or abridge; that many of these powers pertaining to each branch of the government are self-executing, and in no way dependent, except as to the ways and means, upon legislation."

"The Constitution provides that before the President enters upon the execution of his office he shall take an oath—I do solemnly swear that I will faithfully execute the office of President of the United States, and will to the best of my ability *preserve, protect and defend* the Constitution of the United States." And he asks: "Has this clause no significance? Does it not, by necessary implication, invest the President with self-executing powers; that is, powers independent of statute?"

In reply to these propositions, we have this to say: We recognize that the powers of the government, "within its sphere," as defined by the Constitution, and interpreted by the well-settled principles which have resulted from a century of wise and patriotic analysis, are supreme; that these supreme powers extend to the protection of itself and all of its agencies, as well as to the preservation and the perpetuation of its usefulness; and that these powers may be found not only in the express authorities conferred by the Constitution, but also in necessary and proper implications. But while that is all true, it is also true that the powers must be exercised, not only by the organs, but also in conformity with the modes, prescribed by the Constitution itself.

These great federal powers, whose existence in all their plenitude and energy is incontestable, are not autocratic and lawless; they are organized powers, committed by the people to the hands of their servants for their own government, and distributed among the legislative, executive, and judicial departments; they are not *extra* the Constitution, for, in and by that Constitution, and in and by it alone, the United States, as a great democratic federal republic, was called into existence, and finds its continued existence possible. In that instrument is found not only the answer to the general line of argument pursued in this case, but also to the specific question propounded by the Attorney General in respect to the President's oath, and its implications.

The President is sworn to "preserve, protect and defend the Constitution." That oath *has* great significance. The sections which follow that prescribing the oath (secs. 2 and 3 of Art. 2) prescribe the duties and fix the powers of the President. But one very prominent feature of the Constitution which he is sworn to preserve, and which the whole body of the judiciary are bound to enforce, is the closing paragraph of sec. 8, Art. 1, in which it is declared that "the Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

This clause is that which contains the germ of all the implication of powers under the Constitution. It is that which has built up the Congress of the United States into the most august and imposing legislative assembly in the world; and which has secured vigor to the practical operations of the government, and at the same time tended largely to preserve the equilibrium of its various powers among its co-ordinate departments, as partitioned by that instrument. And that clause alone, conclusively refutes the assertion of the Attorney General, that it was "the duty of the executive department of the United States to guard and protect, at any hazard, the life of Mr. Justice Field in the discharge of his duty, because such protection is essential to the existence of the government." Waiving the question of the essentiality of any such protection to the existence of the government, the manifest answer is, that the protection needed and to be given must proceed not from the President, but primarily from Congress. Again, while it is the President's duty to take care that the laws be faithfully executed, it is not his duty to *make* laws or a law of the United States. The laws he is to see executed are manifestly those contained in the Constitution, and those enacted by

Congress, whose duty it is to make all laws necessary and proper for carrying into execution the powers of those tribunals. In fact, for the President to have undertaken to make any law of the United States pertinent to this matter would have been to invade the domain of power expressly committed by the Constitution exclusively to Congress. That body was perfectly able to pass such laws as it should deem expedient in reference to such matter; indeed, it has passed such laws in reference to elections, expressly directing the United States marshals to attend places of election, to act as peace officers, to arrest with and without process, and to protect the supervisors of election in the discharge of their duties; and there was not the slightest legal necessity out of which to imply any such power in the President.

For these reasons the letters of the Attorney General to Marshal Franks, granting that they did import what is claimed, and granting that the Attorney General was to all intents and purposes, *pro hac vice*, the President, invested Neagle with no special powers whatever. They were, if so construed, without authority of law, and Neagle was then and there a simple deputy marshal,—no more and no less.

To illustrate the large sphere of powers self-executing and independent of statutes claimed to be vested in the executive, reference is made to the continually recurring cases of the President's interference for the protection of our foreign-born and naturalized citizens on a visit to their native country; and we are cited, as a striking instance of the exercise of such power, to the case of Martin Kozsta, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen, and who, whilst at Smyrna, was seized by order of an Austrian official and confined on board an Austrian vessel, and who, being afterwards delivered up to Captain Ingraham, commanding an American war vessel, in compliance with a demand, backed by a demonstration of force, on the part of that officer, was placed in the hands of a French counsul subject to negotiations between the American and Austrian governments, resulting in the famous correspondence between the American Secretary of State, Mr. Marcy, and the Chevalier Huelsemann, representing the Austrian government, and the restoration of Kozsta to freedom. We are asked:—Upon what express statute of Congress then existing can this act of the government be justified?

We answer, that such action of the government was justified because it pertained to the foreign relations of the United States, in respect to which the federal government is the exclusive representative and embodiment of the entire sovereignty of the nation, in its united character; for to foreign nations, and in our intercourse with them, states and state governments, and even the internal adjustment of federal power, with its complex system of checks and balances, are unknown, and the only authority those nations are permitted to deal with is the authority of the nation as a unit.

That authority the Constitution vests expressly and conclusively in the treaty-making power—the President and Senate—by one simple and comprehensive grant: "He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur." This broad grant makes enumeration of particular powers unnecessary. All other delegations of powers in reference to the international relations of this country are carefully and specifically enumerated and assigned, one by one, to their designated departments. In reply, therefore, to the question, what law expressly justifies such action, we answer, the organic law, the Constitution, which expressly commits all matters pertaining to our diplomatic negotiations to the treaty-making power.

Other cases are referred to in illustration of the same point; but the one which it is alleged presents that principle in most imposing form is that of *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273. In that case a suit was brought in the name of the United States, by order of the Attorney General, to set aside a patent which had been issued for a large body of land, on the ground that it had been obtained from the government by fraud and deceit practiced upon its officers. There are, it is true, some expressions in the opinion delivered in that case which seem to admit that there is no specific act of Congress expressly authorizing the Attorney General to bring suit for the annulment of a patent procured by fraud from the government; but a close examination of the doctrine of the court shows that it goes no farther than the assertion that the authority of the Attorney General arises by implication, directly and immediately, out of the express law of Congress. The opinion quotes the clause of the Constitution which declares that the judicial power shall extend to all cases to which the United States shall be a party, and says that this means, mainly, where it is a party plaintiff. It then refers to the statute of Congress which expressly directs the United States District Attorneys to bring suits in behalf of the government; and that the suits thus brought by them are to be under the immediate superintendence and control of the Attorney General. The utmost extent to which the court goes is, that whilst admitting there is no express authority in the Attorney General to institute the suit, yet such authority is directly and necessarily involved in the express provisions of the statute vesting him with the entire control and superintendence of such suits, and the provision and control of the District Attorneys in their conduct of them.

Equally conclusive is the answer which the Constitution makes to the assertion that by the Constitution the judiciary is invested, not only with the express powers granted in the Constitution as its share of the government, but with all the judicial powers which have not been expressly withheld from it. It may be found in the clause which declares that "The Congress shall have power . . . to constitute tribunals inferior to the Supreme Court;" and in that which declares it shall make all laws necessary and proper for carrying into execution the powers of those tribunals. The correlation between those clauses is manifest and unmistakable. If Congress can and must, by the very terms of the Constitution, make all laws proper for carrying into execution all the powers of any department of the government, and if it can create the Circuit Court, expand its powers, abridge them, and abolish the court at will, how can it be that that court, at the least, shall have any implied powers derived from the Constitution and independent of the statutes? And yet, in this transaction, it must be remembered that Mr. Justice Field is only claimed to be the representative of that court.

Not only do the foregoing views seem to us to be the logical and unavoidable results of original and independent studies of the Constitution, but they are also sustained and enforced by a long series of judicial recognitions and assertions.

In *United States* v. *Fisher*, 2 Cranch, 358, 396, Chief Justice Marshall, in delivering the opinion of the court, said of the clause above relied on: "In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."

In *McCulloch* v. *Maryland*, 4 Wheat. 316, 420, 421, Chief Justice Marshall, for the court, delivered one of those opinions which are among the chief ornaments of American jurisprudence. It is largely devoted to an exhaustive analysis of the constitutional clause in question. Among other things, he says: "The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble. We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people."

In *United States* v. *Reese*, 92 U.S. 214, 217, Chief Justice Waite, delivering the opinion of the court, said: "Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected."

In *Strauder* v. *West Virginia*, 100 U.S. 303, 310, the court say: "A right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress."

Cooley, in his work on "Constitutional Limitations," collates from the numerous adjudications of this court, cited by him, the following principles: "So far as that instrument [the Constitution] apportions powers to the national judiciary, it must be understood, for the most part, as simply authorizing Congress to pass the necessary legislation for the exercise of those powers by the federal courts, and not as directly, of its own force, vesting them with that authority. The Constitution does not, of its own force, give to national courts jurisdiction of the several cases which it enumerates, but an act of Congress is essential, first, to create courts, and afterwards to apportion the jurisdiction among them. The exceptions are of those few cases of which the Constitution confers jurisdiction upon the Supreme Court by name. And although the courts of the United States administer the common law in many cases, they do not derive authority from the common law to take cognizance of and punish offences against the government. Offences against the nation are defined and their punishment prescribed by acts of Congress." In a note to this paragraph he says: "Demurrer to an indictment for a libel upon the President and Congress. By the court: 'The only question which this case presents is, whether the Circuit Courts can exercise a common law jurisdiction in criminal cases. . . . The general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition. The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several States; whatever is not expressly given to the former the latter expressly reserve. . . . It is not necessary to inquire whether the general government, in any and what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation.' *United States* v. *Hudson*, 7 Cranch, 32; see *United States* v. *Coolidge*, 1 Wheat. 415. 'It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution of laws of the Union. The common law could be made a part of our federal system only by legislative adoption.' Per McLean, J., *Wheaton* v. *Peters*, 8 Pet. 591. 658;" and citing many other authorities.

In *Tennessee* v. *Davis*, 100 U.S. 257, 267, referring to the judiciary act of 1789, the court said: "It [the Constitution] did not attempt to confer upon the federal courts all the judicial power vested in the government. Additional grants have from time to time been made. Congress has authorized more and more fully, as occasion has required," etc.

It would seem plain, therefore, that if the Constitution means anything, and if these judicial utterances, extending as they do over a period of eighty years, and embracing a variety of interests, mean anything, they mean that the power to provide and prescribe the laws necessary to effectuate the governmental and official powers of the United States and its officers is vested in Congress.

The gravamen of this case is in the assertion that Neagle slew Terry in pursuance *of a law* of the United States. He who claims to have committed a homicide by authority must show the authority. If he claims the authority of law, then *what* law? And if a law, how came it to be a law? Somehow and somewhere it must have had an origin. Is it a law because of the existence of a special and private authority issued from one of the executive departments? So in almost these words it is claimed in this case. Is it a law because of some constitutional investiture of sovereignty in the persons of judges who carry that sovereignty with them wherever they may go? Because of some power inherent in the judiciary to create for others a rule or law of conduct outside of legislation, which shall extend to the death penalty? So, also, in this case, *in totidem verbis*, it is claimed. We dissent from both these claims. There can be no such law from either of those sources. The right claimed must be traced to legislation of Congress; else it cannot exist.

If it be said that that Congress has the power to make such laws, yet in the absence of statutes from that source other departments may act in the premises; or if it be said that the possession of that power by the government does not negative the existence of similar powers in other departments of the government; the response that these powers are plainly not concurrent, but are exclusive, can be made in the language of Mr. Justice Story, in *Prigg* v. *Pennsylvania*, 16 Pet. 539, 617. Speaking of the fugitive slave law of 1793, he says: "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, . . .in such a case the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is, as the direct provisions made by it."

If it be said that that case had reference to the interference of a State with congressional powers, whilst in the case at bar no such question is involved, the answer is that the difference is favorable and not adverse to the theory of this opinion. The principle is the same; and if that principle can be applied, as applied it was, to the denial to a state legislature of the powers previously enjoyed over matters originally appertaining to it, *a multo fortiori* will it apply to the exclusion of two coordinate departments of the same government from powers which they never possessed.

As before stated, if the killing of Terry was done "in pursuance of a law of the United States," that law had somewhere an origin. There are under the general government only two possible sources of law. The common law never existed in our federal system. The legislative power possessed by the United States must be found, either exercised in the Constitution as fundamental law, or by some body or person to whom it was delegated by the

Constitution. It has already been pointed out that the Constitution does not itself create any such law as that contended for; and that it could not have been created by any executive or judicial action or status is made manifest, not only by the clause in sec. 8, Art. I, already cited and commented on, but also by sec. 1, Art. I, and the two paragraphs of Art. VI.

Sec. 1, Art. I, provides that "*All* legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The second paragraph of Art. VI provides that "the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." Now, what is it that constitutes the supreme laws, of which so much is said in this case? How distinctly, how plainly and how fully the Constitution answers! The Constitution itself, the treaties, and the laws made in pursuance of the Constitution. Made by whom? By Congress, manifestly. The two clauses already quoted give the power of the legislation in the most sweeping terms. It alone has power to make any law. Anything purporting to be a law not enacted by Congress would not be "in pursuance of" any provision of the Constitution.

Thus we are driven to look for the source of this asserted law to some legislation of Congress—legislation made under either its express constitutional authority, or under its properly implied authority, it is immaterial which; and there is none of either class.

The authority is sought to be traced here through the self-preservative power of the federal judiciary implied from the Constitution; and then through the obligation of the executive to protect the judges, implied from the Constitution, whereas there is no such implication in either case, for the simple but all-sufficient reason that by the Constitution itself the whole of those functions is committed to Congress.

Since then the Constitution did not, by its own direct provisions, regulate this matter, but committed it to the hands of Congress with full powers in the premises; it is only by the enactment of some law of Congress that the appellee can show that he is in custody "in violation of the Constitution." As previously remarked, the two propositions are, as to this case, essentially one. Turning again to the statute under which the writ is sued out, we find that the clause relied on is that which makes the writ applicable where the person "is in custody for an act done or omitted in pursuance of a law of the United States." The question then arises, What sort of law? What does the expression import? Is it not plain that it means just what the same expression all through the Constitution imports?

If that instrument, which is the fountain of the federal power, be consulted, it will be found that in it and the amendments thereto the word law, in either its singular form or its plural, laws, is used forty-two times. Of these instances of that use sixteen are where the word is used in reference to the jurisprudence of the States, and of the law of nations, or where they are merely terms of description—such as "courts of law," "cases in law and equity," etc. Of the other instances of its use, and which all have reference to that body of rules which constitute the jurisprudence distinctly of the United States, there are only three cases in which it is not manifest that the word is used as equivalent to "statutes," "enactments of the Congress;" and it is clear in those three instances the word is used also as equivalent to "statutes." The following are examples:

"The Congress may, at any time, *by law*, make or alter such regulations, [in regard to the election of Senators and Representatives]." Art. I, sec. 4.

"Every bill . . . shall, before it become *a law*, be presented," etc. Art. I sec. 7.

"Congress shall have power . . . to establish . . . uniform *laws* on the subject of bankruptcies," etc. Art. I, sec. 8.

"Congress shall have power . . . to make *all laws* which shall be necessary and proper," etc. Art. I, sec. 8.

"No bill of attainder or *ex post facto law* shall be passed." Art. I, sec. 9.

"Congress shall make no *law* respecting an establishment of religion." 1st Amendment.

It would be tedious, and it is unnecessary, to set them all forth. They all have the same *manifest* meaning of "statutes," except three, and in those three instances the words do not mean anything other than statutes. We think it plain that the expression, "a law of the United States," as used in section 753 of the Revised Statutes, mean just what the similar expression means all through the Constitution,—and that is a *statute* of the United States. *Tennessee* v. *Davis*, 100 U.S. 257, 264.

Of the decisions of this court cited as authority to sustain the order discharging the appellee, *Ex parte Siebold*, 100 U.S. 371, and *Tennessee* v. *Davis*, *supra*, are relied on as having the most direct bearing on the case. We do not consider *Ex parte Seibold* as being adverse to the proposition which we maintain. In that case the existence of express statutes upon which the controversy arose was undisputed. The sole question was as to the constitutional competency of Congress to pass certain laws which, in the most express, explicit, and imperative words, required marshals and deputy marshals of the United States to attend places for the election of members of Congress, to keep the peace at the polls, make arrests, and protect the supervising officers in the discharge of their duties at those elections. The court decided that the enactments of Congress in question were constitutional. The power of Congress to pass these laws being thus settled, no assertion as to the powers of the marshals and deputy marshals to execute them in the States can be found in that able opinion which do not follow as a logical consequence. We fail to see anywhere in the decision any intimation that, independently of such legislation, the officers therein named could, by virtue of their office, have exercised the same powers in obedience to the instructions of an executive department, in the exercise of its authority implied from the Constitution.

In *Tennessee* v. *Davis*, the case was removed from a state court to the Circuit Court of the United States, under the express provisions of section 643 of the Revised Statutes. The homicide, for which the petitioner was prosecuted, was committed by him while executing his duties, as a revenue officer, in pursuance of the express requirements of the revenue laws, and in defence of his own life, upon a party offering unlawful resistance. So far from running counter to the position we are seeking to maintain, we think the principle there laid down, on the point we are now discussing, is in accord with that position. The language of the court, through Mr. Justice Strong, who delivered its opinion, is as follows: "Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right, or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted. Story on the Constitution, sec. 1647; 6 Wheat. 379."

Whilst it is true that the opinions in both of those cases assert in the strongest and most impressive language the supremacy of the government of the Unites States in the exercise of the powers conferred upon it by the Constitution, we regard them also as a vindication of Congress as the law-making department of the government, as the depository of the implied and constructed powers of the government; or, as Mr. Chief Justice Marshall expresses it, of the power to legislate upon that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

As the *Siebold Case* and *Tennessee* v. *Davis* have been referred to as the most important and directly in point in support of the opposite view, we do not deem it necessary to give an extended examination of the series of cases decided by the Circuit and District Courts cited to the same purport. *Ex parte Jenkins*, 2 Wall. Jr. 521, to which attention is more especially called, combined in itself the main features of most of the others, which were proceedings under the fugitive slave law, in which United States marshals were arrested while executing process under that law by state officers acting under the authority of the statutes of the State, the inevitable effect, if not the avowed object, of which was to nullify the operation of the aforesaid act of Congress.

This was so in *Ex parte Jenkins*. The United States marshal was arrested on a warrant issued by a state magistrate while he was executing a warrant issued under said law of Congress. He was brought before the Circuit Court of the United States for the Eastern District of Pennsylvania, on a writ of *habeas corpus*, and was discharged upon the ground that the fugitive slave law, having been enacted in pursuance of the Constitution of the United States, was paramount to the law of Pennsylvania in conflict with it, and that the marshal, being in custody for an act done in pursuance of that law of Congress, and in execution of process under it, was entitled to his discharge. It is so manifest that that case was within the provision of section 753 of the Revised Statutes that further comment is unnecessary; and the same may be said of all of the other decisions of the circuit and district courts. In every one of them the party discharged was in custody either for an act done in pursuance of an express statute of Congress, or in the execution of a decree, order, or process of a court, or the custody was in violation of the Constitution of the United States.

We stated at the outset of these remarks that we raised no question upon the discussion of the history of the legislation of Congress upon the subject of the writ of *habeas corpus*. We think, however, it is pertinent in this connection to inquire what was the necessity for any such legislation at all if the theory contended for as to the sufficiency of the self-executing powers of the executive and judicial departments of the government to protect all the agencies and instrumentalities of the federal government is correct. Why could not President Jackson, in 1833, as the head of the executive department, invested with the power and charged with the duty to take care that the laws be faithfully executed and to defend the Constitution, have enforced the collection of the federal revenues in the port of Charleston, and have protected the revenue officers of the government against any arrest made under the pretensions of state authority, without the aid of the act of 1833?

Why, in 1842, when the third *habeas corpus* act was passed, could not the President of the United States, by virtue of the same self-executing powers of the executive, together with those of the judicial department, have enforced the international obligations of the government, without any such act of Congress? It is a noteworthy fact in our history, that whenever the exigencies of the country, from time to time, have required the exercise of executive and judicial power for the enforcement of the supreme authority of the United States government for the protection of its agencies, etc., it was found, in every instance, necessary to invoke the interposition of the power of the national legislature. As early as 1807, in *Ex parte Bollman and Swartwout*, 4 Cranch, 75, 94, Chief Justice Marshall said: "The power to award the writ [of *habeas corpus*] by any of the courts of the United States, must be given by written law. . . . The inquiry, therefore, on this motion will be, whether by any statute compatible with the Constitution of the United States, the power to award a writ of *habeas corpus*, in such case as that of Erick Bollman and Samuel Swartwout, has been given to this court."

It is claimed that such a law is found in section 787 of the Revised Statutes, which is as follows:

"It shall be the duty of the marshal of each district to attend the district and circuit courts when sitting therein, and to execute, throughout the district, all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty."

It is contended that the duty imposed upon the marshal of each district by this section is not satisfied by a mere formal attendance upon the judges while on the bench; but that it extends to the whole term of the courts while in session, and can fairly be construed as requiring him to attend the judge while on his way from one court to another, to perform his duty. It is manifest that the statute will bear no such construction. In the first place, the judge is not the court; the person does not embody the tribunal, nor does the tribunal follow him in his journeys. In the second place, the direction that he shall attend the court confers no authority or power on him of any character; it is merely a requirement that he shall be present, in person, at the court when sitting, in order to receive the lawful commands of the tribunal, and to discharge the duties elsewhere imposed upon him.

Great as the crime of Terry was in his assault upon Mr. Justice Field, so far from its being a crime against the court, it was not even a contempt of court, and could not have received adequate punishment as such. Section 725 of the Revised Statutes limits contempt to cases of misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice.

It is claimed that the law needed for appellee's case can be found in section 788 of the Revised Statutes. That section is as follows: "The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof."

It is then argued that by the Code of California the sheriff has extensive powers as a conservator of the peace, the statutes to that effect being quoted *in extenso*; that he also has certain additional common law powers and obligations to protect the judges and to personally attend them on their visits to that State; that, therefore, no statutory authority of the United States for the attendance on Mr. Justice Field by Neagle, and for Neagle's personal presence on the scene was necessary; and that that statute constituted Neagle a peace officer to keep the peace of the United States. This line of argument seems to us wholly untenable.

By way of preliminary remark it may be well to say, that so far as the simple fact of Neagle's attendance on Mr. Justice Field, and the fact of his personal presence, are concerned, no authority, statutory or otherwise, was needed. He had a right to be there; and being there, no matter how or why, if it became necessary to discharge an official duty, he would be just as much entitled to the protection of section 753 of the Revised Statutes as if he had been discharging an official duty in going there. The fallacy in the use made of section 788, in the argument just outlined, is this: That section gives to the officers named the same measure of powers when in the discharge of their duties as those possessed by the sheriffs, it is true; but it does not alter the duties themselves. It does not empower them to enlarge the scope of their labors and responsibilities, but only adds to their efficiency within that scope. They are still, by the very terms of the statute itself, limited to the execution of "the laws of the United States;" and are not in any way by adoption, mediate or immediate, from the code or the common law, authorized to execute the laws of California. The statute, therefore, leaves the matter just where it found it. If the act of Terry had resulted in the death of Mr. Justice Field, would the murder of him have been a crime against the United States? Would the government of the United States, with all the supreme powers of which we have heard so much in this discussion, have been competent, in the present condition of its statutes, to prosecute in its own tribunals the murder of its own Supreme Court justice, or even to inquire into the heinous offence through its own tribunals? If yes, then the slaying of Terry by the appellee, in the necessary prevention of such act, was authorized by the law of the United States, and he should be discharged; and that, independently of any official character, the situation being the same in the case of any citizen. But if no, how stands the matter then? The killing of Terry was not by authority of the United States, no matter by whom done; and the only authority relied on for vindication must be that of the State, and the slayer should be remanded to the state courts to be tried. The question then recurs, Would it have been a crime against the United States? There can be but one answer. Murder is not an offence against the United States, except when committed on the high seas or in some port or harbor without the jurisdiction of the State, or in the District of Columbia, or in the Territories, or at other places where the national government has exclusive jurisdiction. It is well settled that such crime must be defined by statute, and no such statute has yet been pointed out. The United States government being thus powerless to try and punish a man charged with murder, we are not prepared to affirm that it is omnipotent to discharge from trial and give immunity from any liability to trial where he is accused of murder, unless an express statute of Congress is produced permitting such discharge.

We are not unmindful of the fact that in the foregoing remarks we have not discussed the bearings of this decision upon the autonomy of the States, in divesting them of what was once regarded as their exclusive jurisdiction over crimes committed within their own territory, against their own laws, and in enabling a federal judge or court, by an order in a *habeas corpus* proceeding, to deprive a State of its power to maintain its own public order, or to protect the security of society and the lives of its own citizens, whenever the amenability to its courts of a federal officer or [employee] or agent is sought to be enforced. We have not entered upon that question, because, as arising here, its suggestion is sufficient, and its consideration might involve the extent to which legislation in that direction may constitutionally go, which could only be properly determined when directly presented, by the record in a case before the court of adjudication.

For these reasons, as briefly stated as possible, we think the judgment of the court below should be reversed and the prisoner remanded to the custody of the sheriff of San Joaquin County, California; and we are the less reluctant to express this conclusion, because we cannot permit ourselves to doubt that the authorities of the State of California are competent and willing to do justice; and that even if the appellee had been indicted, and had gone to trial upon this record, God and his country would have given him a good deliverance.

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18. *Marchand v. Griffon*, 140 U.S. 516 (1891) (*aff'g*) [Debt. Wife's estate. Civil Law.]

19. *Williams v. Heard*, 140 U.S. 529 (1891) (*rev'g*) [Bankruptcy. Assignment.]

20. *Kneeland v. Bass Foundry & Mach. Works*, 140 U.S. 592 (1891) (*aff'g*) [Receivers. Contracts. Appellate review]

21. *Manning v. Amy*, 140 U.S. 137 (1891) (*aff'g*) [Removal jurisdiction.]

22. *Kneeland v. Lawrence*, 140 U.S. 209 (1891) (*aff'g*) [Bonds. Bona fide purchasers.]

23. *Dwight v. Merritt*, 140 U.S. 213 (1891) (*aff'g*) [Taxes. Duties.]

24. *Gleeson v. Virginia Midland Ry.*, 140 U.S. 435 (1891) (*rev'g*) [Tort. Negligence. Act of God. Burden proof.]

25. *Board of County Comm'rs v. Rose*, 140 U.S. 71 (1891) (*aff'g*) [Pleading. Bonds.]

26. *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76 (1891) (*aff'g*) [Evidence. Insurance policies. Standard of review.]

27. *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891) (*aff'g*) [Injunctions. 11th Amend.]

28. *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U.S. 569 (1891) (*aff'g*) [Demurrer. Land Grants.]

29. *Howard v. Stillwell & Bierce Mfg. Co.*, 139 U.S. 199 (1891) (*aff'g*) [Contract. Lost profits. Damages.]

30. *Simmons v. Saul*, 138 U.S. 439 (1891) (*aff'g*) [Equity. Accounting. Estates.]

31. *Heath v. Wallace*, 138 U.S. 573 (1891) (*aff'g*) [Real property. Ejectment. Land grants. Deference to Interior Dept.]

32. *Gormley v. Bunyan*, 138 U.S. 623 (1891) (*aff'g*) [Assumpsit. Evidence.]

33. *Merrill v. Town of Monticello*, 138 U.S. 673 (1891) (*aff'g*) [Bonds. Municipal corporation.]

34. *North v Peters*, 138 U.S. 271 (1891) (*aff'g*) [Equity. Remedies. Injunction.]

35. *Egan v. Clasbey*, 137 U.S. 654 (1891) (*aff'g*) [Appellate review. Errors. Corporations.]

36. *United States ex rel. Redfield v. Windom*, 137 U.S. 636 (1891) (*aff'g*) [Mandamus. Government contracts.]

37. *St. Paul, M & M. Ry. v. Phelps*, 137 U.S. 528 (1890) (*rev'g*) [Equity. Quiet title. Land grants.]

38. *Merritt v. Cameron*, 137 U.S. 542 (1890) (*rev'g*) [Duties. Taxes.]

39. *Cadwalader v. Partridge*, 137 U.S. 553 (1890) (*rev'g*) [Duties. Taxes. Same issues as *Merritt.*]

40. *Busell Trimmer Co. v. Stevens*, 137 U.S. 423 (1890) (*aff'g*) [Patents. Novelty.]

41. *Broom v. Armstrong*, 137 U.S. 266 (1890) (*aff'g*) [Mortgage foreclosure. Action in rem. Lis pendens. Bona fide purchaser.]

42. *Florsheim v. Schilling*, 137 U.S. 64 (1890) (*aff'g*) [Patents. Novelty.]

43. *McCall v. California*, 136 U.S. 104 (1890) (*rev'g*) [Commerce clause. Interstate Commerce. Tax.]

44. *Norfolk & W. Ry. v. Pennsylvania*, 136 U.S. 114 (1890) (*rev'g*) [Privileges & Immunities. Corporations. Interstate commerce.]

45. *Hot Springs R.R. v. Williamson*, 136 U.S. 121 (1890) (*aff'g*) [Jury instructions. Eminent domain.]

46. *Lovell v. Cragin*, 136 U.S. 130 (1890) (*rev'g in part*) [Equity Actions in rem. Mortgages. Notes. Civil Law.]

47. *United States v. Voorhees*, 135 U.S. 550 (1890) (*aff'g*) [Restitution. Mistake.]

48. *Washington & G. R.R. v. McDade*, 135 U.S. 554 (1890) (*aff'g*) [Tort. Personal injury. Master servant. Assumption of risk. Contributory negligence.]

49. *United States v. Chase*, 135 U.S. 255 (1890) [Divided circuit court certified questions on motion in arrest of judgment on indictment for mailing obscene letter] (Holding that "writing" does not include the text of a letter.)

50. *In re Neagle* [*Cunningham v. Neagle*], 135 U.S. 1 (1890) (Lamar, J., *dissenting*) [Police power of federal government. Immunity.]

51. *Wheeler v. Cloyd*, 134 U.S. 537 (1890) (*appeal dismissed*) [Amount in controversy. Appellate review.]

52. *Little v. Bowers*, 134 U.S. 547 (1890) (*appeal dismissed*) [Taxes. Appellate jurisdiction.]

53. *United States v. Jones*, 134 U.S. 483 (1890) (*aff'g*) [Courts. Commissioner's compensation.]

54. *Henderson Bridge Co. v. McGrath*, 134 U.S. 260 (1890) (*aff'g*) [Contract. Modification.]

55. *DeWitt v. Berry*, 134 U.S. 306 (1890) (*aff'g*) [Contract. Warranty. Parole evidence.]

56. *McKey v. Village of Hyde Park*, 134 U.S. 84 (1890) (*rev'g*) [Real property. Dedication.]

57. *Crenshaw v. United States*, 134 U.S. 99 (1890) (*aff'g*) [Armed Service. Officers. Term of Service.]

58. *Gregory v. Stetson*, 133 U.S. 579 (1890) (*aff'g*) [Equity. Necessary parties.]

59. *Corbin v. Gould*, 133 U.S. 308 (1890) (*aff'g*) [Trademark.]

60. *Burt v. Evory*, 133 U.S. 349 (1890) (*rev'g*) [Patent. Novelty.]

61. *United States v. Waters*, 133 U.S. 208 (1890) (*aff'g*) [Attorney. District attorney's fees.]

62. *Richardson's Ex'r v. Green*, 133 U.S. 30 (1890) (*aff'g*) [Corporations. Directors. Fiduciaries.]

63. *United States v. Davis*, 132 U.S. 334 (1889) (*aff'g*) [U.S. Marshal. Compensation.]

64. *United States v. Schofield*, 132 U.S. 337 (1889) (*aff'g*) [same issue as *Davis*.]

65. *Young v. Clarendon Township*, 132 U.S. 340 (1889) (*aff'g*) [Bonds. Municipal Corporations.]

66. *Hastings & D. R.R. v. Whitney*, 132 U.S. 357 (1889) (*aff'g*) [Homestead lands.]

67. *Muller v. Norton*, 132 U.S. 501 (1889) (*rev'g*) [Assignment for benefit of creditors.]

68. *Dent v. Ferguson*, 132 U.S. 50 (1889) (*rev'g*) [Contract. Execution. Capacity.]

69. *Allman v. United States*, 131 U.S. 31 (1889) (*rev'g*) [U.S. Mail.]

70. *Abendroth v. Van Dolsen*, 131 U.S. 66 (1889) (*aff'g*) [Bankruptcy.]

71. *Morgan v. Struthers*, 131 U.S. 246 (1889) (*rev'g*) [Stock. Contract to sell.]

72. *Bacon v. Northwestern Mut. Life Ins. Co.*, 131 U.S. 258 (1889) (*aff'g*) [Mortgage. Notice.]

73. *Lake County v. Rollins*, 130 U.S. 662 (1889) (*rev'g*) [Constitutional interpretation. Colorado laws.]

74. *Lake County v. Graham*, 130 U.S. 674 (1889) (*rev'g*) [Municipal bonds. Purchasers.]

75. *Synnott v. Shaughnessy*, 130 U.S. 572 (1889) (*aff'g*) [Fraud. Conveyance. Deeds.]

76. *New York & Colorado Mining Syndicate & Co. v. Fraser*, 130 U.S. 611 (1889) (*aff'g*) [Evidence. Refreshing recollection. Damages.]

77. *Lyon v. Alley*, 130 U.S. 177 (1889) (*aff'g*) [Taxes. Liens.]

78. *Parley's Park Silver Mining Co. v. Kerr*, 130 U.S. 256 (1889) (*aff'g*) [Real property. Title to mine.]

79. *United States v. Watson*, 130 U.S. 80 (1889) (*aff'g*) [Armed forces. Term of service. Compensation.]

80. *Bullitt County v. Washer*, 130 U.S. 142 (1889) (*aff'g*) [Pleading. Amendments. Reviewable error.]

81. *Chapman v. Barney*, 129 U.S. 677 (1889) (*rev'g*) [Pleading. Amendments. Citizenship. Jurisdiction.]

82. *Bene v. Jeantet*, 129 U.S. 683 (1889) (*aff'g*)[Patents. Disclosure.]

83. *Schraeder Mining & Mfg. Co. v. Packer*, 129 U.S. 688 (1889) (*aff'g*) [Trespass to land. Removal.]

84. *United States v. Corwin*, 129 U.S. 381 (1889) (*aff'g*) [Contract. Evidence.]

85. *Wallace v. Johnstone*, 129 U.S. 58 (1889) (*aff'g*) [Quiet title.]

86. *Noble v. Hammond*, 129 U.S. 65 (1889) (*rev'g*) [Bankruptcy. Fraud. Trust corpus.]

87. *Anderson v. Miller*, 129 U.S. 70 (1889) (*aff'g*) [Patent. Infringement.]

88. *Cragin v. Powell*, 128 U.S. 691 (1888) (*rev'g*) [Land. Boundary. Surveys.]

89. *United States v. McDonald*, 128 U.S. 471 (1888) (*aff'g*) [Armed forces. Officer. Compensation for traveling expenses.]

90. *United States v. Reisinger*, 128 U.S. 398 (1888) (*certified question answered in affirmative*) [Punishment for violation of repealed legislation.]

91. *Brown v. Guarantee Trust & Safe Deposit Co.* 128 U.S. 403 (1888) (*aff'g*) [Joinder. Necessary parties. Contract. Time of performance.]

92. *Wood v. Guarantee Trust & Safe Deposit Co.*, 128 U.S. 416 (1888) (*aff'g*) [Assignment. Defenses to payment on coupons.]

93. *Johnson v. Christian*, 128 U.S. 374 (1888) (*aff'g*) [Agency. Equity. Injunction against legal remedy.]

94. *Kidd v. Pearson*, 128 U.S. 1 (1888) (*aff'g*) [State power to regulate or ban distillery not unconstitutional. No violation of interstate commerce where bans "only" manufacturing.]

95. *Brown v. District of Columbia*, 127 U.S. 579 (1888) (*aff'g*) [Contract. Ratification by D.C. Board of Public Works.]

96. *Allen v. Gillette*, 127 U.S. 589 (1888) (*aff'g*) [Trustee. Self-dealing.]

97. *Falk v. Moebs*, 127 U. S. 597 (1888) (*aff'g*) [Agency. Signature of corporation.]

98. *United States v. Beebe*, 127 U.S. 338 (1888) (*aff'g*) [Land grant. Limitations period.]

99. *United States v. Weld*, 127 U.S. 51 (1888) (*aff'g*) [Claims court jurisdiction. Treaty of Washington.]

100. *Lyon v. Perin & Gaff Mfg. Co.*, 125 U.S. 698 (1888) (*aff'g*) [Res judicata. Dismissal as bar.]

101. *Southern Co. of Nevada v. Silva*, 125 U.S. 247 (1888) (*aff'g*)[Equity pleading. Fraud. Purchase.]

102. *Hannibal & St. J. R.R. v. Missouri River Packet Co.*, 125 U.S. 260 (1888) (*aff'g*) [Statutory construction of act authorizing bridge.]

103. *Clement v. Packer*, 125 U.S. 309 (1888) (*rev'g*) [Land grants. Evidence.]

B. Circuit Court Opinion in Reverse Chronological Sequence

1. *United States v. Sanges*, 48 F. 78 (C.C.N.D. Ga. 1891) (sustaining demurrer to indictment) [Constitutional Law. Criminal conspiracy. Civil Rights.]

2. *Gann v. Northeastern Ry. Co.*, 57 F. 417 (C.C.N.D. Ga. 1891) (remanding) [Removal jurisdiction.]

3. *Walker v. Lea*, 47 F. 645 (C.C.N.D. Miss. 1891) (reversing grant of habeas corpus) [U.S. Marshal subject to state criminal laws.]

4. *Red River Cattle Co. v. Needham*, 47 F. 358 (C.C.N.D. Tex. 1891) (application for bond for second writ of error *denied*) [Writ of error. Bond.]

5. *Bornemann v. Norris*, 47 F. 438 (C.C.N.D. Fla. 1891) (quashing writ of execution) [Judicial sale. Procedure.]

6. *McKinstry v. United States*, 40 F. 813 (C.C.S.D. Ala. 1889) (Lamar, J., *concurring*) (granting order for new trial) [Evidence. Compensation of Commissioner of Court.]

7. *The Madrid*, 40 F. 677 (C.C.E.D. La. 1889) (holding that liens created by state law must be given equal priority to admiralty liens) [Materialmen's lien on vessel. Maritime lien.]

8. *United States v. Breen*, 40 F. 402 C.C.E.D. La. 1889) (overruling demurrer to indictment) [Delegation of rulemaking to Secretary of War.]

9. *Strong v. United States*, 40 F. 183 (C.C.S.D. Ala. 1889) (granting motion to dismiss writ of error) [Appellate jurisdiction.]

LAMAR TO POSTERITY—A CENTENNIAL MEMOIR

Daniel J. Meador[*]

Lucius Quintus Cincinnatus Lamar—surely one of the most impressive names in American history—was at center stage in the tumultuous and tragic drama of the nineteenth century. He personified Shakespeare's proposition that a man in his time plays many parts. He was lawyer, university professor, infantry colonel, diplomat in Europe, Member of the House of Representatives, United States Senator, Secretary of the Interior, and Supreme Court Justice.[1]

Lamar holds at least two distinctions in American history. First, he was virtually the only pre-war Southern leader whose career spanned the chasm of the Civil War and who returned to post-war leadership. Second, he is the only American to have served in both houses of Congress, the President's cabinet, and the Supreme Court.

In addition to those achievements, two aspects of the man himself are worth noting. One was his exceptional oratorical ability. He had a superb command of the English language and was said to have a "magnificent presence" and a "flashing eye."[2] He was told as early as his college years that he had the power "to stir men's hearts and to convince their reason."[3] The other characteristic was his unusual and memorable personality, a strange mixture of inconsistent traits: warm, witty, moody, aloof, dreamy, loving, generous, detached, and dejected. He could charm a crowd, from Washington drawing rooms to huge gatherings on the hustings. Women spoke of the "witchery of his presence."[4] Chief Justice Fuller said that he had "a certain Oriental dreaminess of temperament."[5] Yet he was also a man of action, not averse to physical combat.

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[1] Three book-length biographies have been published: EDWARD MAYES, LUCIUS Q.C. LAMAR: HIS LIFE, TIMES AND SPEECHES 1825-1893 (1896); WIRT ARMISTEAD CATE, LUCIUS Q.C. LAMAR: SECESSION AND REUNION (1935); JAMES L. MURPHY, L.Q.C. LAMAR: PRAGMATIC PATRIOT (1973). A doctoral dissertation on file in the University of North Carolina Library at Chapel Hill is Benny Leronius Reeves, Lucius Quintus Cincinnatus Lamar: Reluctant Secessionist and Spokesman for the South, 1860-1885 (1973) (unpublished dissertation, University of North Carolina (Chapel Hill)). Because much of the information in this article is contained in these works, no effort has been made here to cite the precise source of all facts mentioned. Sources are cited, however, for all quoted material and for information not contained in the above works.

For more than thirty years I have been on the trail of this fascinating figure, from remote Mississippi county seats to the English countryside, visiting places where he lived and worked, delving into old papers and letters, both public and private. I have often fantasized about the grand experience it would have been to have met and talked with him—perhaps in some Victorian parlor or preferably in rocking chairs on his porch late on a summer afternoon. Although I feel that I know Lamar, I doubt that I really do. Mark Twain said that a man's acts and words are the mere visible crust of his world, that his real life is led in his thoughts. Biographies, he said, are merely the buttons and clothes of a man; his real biography cannot be written.[6] Though we do not know Lamar's thoughts, we can judge him by what he said and did.

With that in mind, on this occasion, one hundred years after his death, I wish to pose and undertake to answer this question: What is there about L.Q.C. Lamar's life and work that has enduring significance? The question could be put another way: What is there about this man that justifies attaching his name to the home of the University of Mississippi Law School?

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[2] CHARLES B. GALLOWAY, GREAT MEN AND GREAT MOVEMENTS 198 (1914).

[3] MAYES, *supra* note 1, at 33. Lamar's oratorical techniques and skills are analyzed in Donald C. Streeter, *The Major Public Addresses of Lucius Q.C. Lamar During the Period 1874 to 1890, in* 16 SPEECH MONOGRAPHS 114 (1949).

[4] MRS. BURTON HARRISON, RECOLLECTIONS GRAVE AND GAY 160 (1912).

[5] *In Memoriam*, Lucius Quintus Cincinnatus Lamar, LL.D., 148 U.S. 707, 711 (1893).

[6] MARK TWAIN, 1 MARK TWAIN'S AUTOBIOGRAPHY 2 (1924).

Although Lamar's significance might stem from his service at the highest level in all three branches of the federal government, I would not rely solely on that. Instead, I would point to three aspects of the man and his work: first, his legal mind and his ability to articulate legal, constitutional, and political theories; second, his role as the great national reconciler in the last third of the nineteenth century; and third, his character.

Before addressing these, I must say something of the time and place into which fate brought Lamar and the circumstances that shaped him, circumstances over which he had no more control than we have had over the circumstances that have shaped us. As Woodrow Wilson is quoted as saying, "a man's roots mean more than his leafage."[7] Without an awareness of Lamar's roots we cannot understand him and appreciate what he accomplished later.

I. THE BEGINNING: TWO MEN AND TWO IDEAS

On the day Lamar was born, September 17, 1825, the aging Thomas Jefferson was in retirement at Monticello. Jefferson would die ten months later, appropriately on July 4th, the fiftieth anniversary of the Declaration of Independence. John Adams died the same day. As symbolized by this extraordinary timing, the nation was at a watershed. Lamar's birth coincided with the end of one era in American history and the beginning of another. The generation of the Revolution and the formative years of the Federal Union was passing. A new generation was coming on the scene, and new forces were abroad in the land. Only five years earlier, in the debates over the Missouri Compromise, slavery had ominously surfaced for the first time as a national issue, a "fire bell in the night," in Jefferson's chilling metaphor.

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[7] BERNARD E. BAIN, "Woodrow Wilson: His Place of Birth and the Influences Which Molded Him," *in* VIRGINIANS REMEMBER WOODROW WILSON (Raymond F. Pisney ed., 1978).

Lamar entered the world far south of Monticello, in Putnam County, Georgia. His birthplace was in the heart of the cotton kingdom, a burgeoning economic and social system fueled by a combination of the cotton gin, slave labor, and vast reaches of new land across Georgia, Alabama, and Mississippi. Both of his parents came from families well-established in Georgia. Indeed, the Lamars were among the most prominent families in the state throughout the nineteenth century. The young Lucius grew up among cotton planters, lawyers, medical doctors, Methodist preachers, and slaves.

Two men above all others had a profound influence on Lamar. One was his father, who bore the same ponderous Roman names. He had studied at the celebrated Litchfield Law School in Connecticut[8] and had been admitted to the Georgia bar where he had quickly made a favorable impression on his legal elders. At an unusually young age he had been chosen by the legislature to be a judge on the Superior Court, then the highest court in the state, whose judges served in both trial and appellate capacities. But this promising career was doomed. On the fourth of July, after attending a public ceremony in Milledgeville, Judge Lamar came home, took his pistol, went into the garden, and killed himself. The only reason ever suggested for the suicide was a mental derangement or depression of some sort. His son, Lucius, was then nine years old.

The image of his dead father, who was a well educated, able young judge with a bright legal and political future, was indelibly imprinted on Lamar's mind. He seemed to have felt challenged to live up to his father's reputation and accomplishments, yet always to have believed that he fell short.[9] Despite his abilities and accomplishments, he underrated himself and often expressed feelings of inadequacy.

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[8] He was a student in the Litchfield Law School during 1817. MARIAN C. MCKENNA, TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL 192 (1986).

[9] Years later he said, "[t]here is one circumstance which alone is sufficient to endear me to Georgia above all other places. In her bosom rests the sacred dust of my honored father whose blood, whose name, whose very temperament, whose everything, save his shining virtues and surprising genius, I have inherited. Such things have greater influence on my actions than on those of most men." Letter from Lamar to Robert G. Harper (Feb. 8, 1852), *in* A.C. LUNSFORD PAPERS (on file with the Department

In time, though, the void left by his father came to be filled by a second influential man: Augustus Baldwin Longstreet, a formidable figure in the antebellum South. He had graduated from Yale and, like the deceased L.Q.C. Lamar, had studied at the Litchfield Law School[10] and had served as a judge on the Superior Court of Georgia. Longstreet had then become an ordained Methodist minister and president of the newly established Emory College. He was widely known as a result of the publication of his popular book, *Georgia Scenes*.[11] Later he served as president of the University of Mississippi and of the University of South Carolina. He was an ardent admirer of John C. Calhoun and was an articulate spokesman for the states'-rights theory. Lamar came under Longstreet's influence when he entered Emory in 1841. Two years after his graduation, Lamar married Longstreet's daughter, Virginia, known as Jennie. It was that marriage, and Lamar's veneration for Longstreet, that later brought him to Mississippi.

At Emory, Lamar received a classical education. The required curriculum included English literature, ancient and modern languages, mathematics, natural science, and the Bible. Before entering college, he had already read, among other works in his father's considerable library, Plutarch's *Lives* and Locke's *Essay on Human Understanding*.[12] His grounding in

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of Archives and History, Atlanta, GA).

[10] Longstreet studied at the Litchfield Law School during 1813. MCKENNA, *supra* note 8, at 192. His political idol, John C. Calhoun, was a student there in 1805. *Id.* at 188.

[11] A humorous collection of stories first published in newspapers and then in book form in 1835. Several later editions were published. The book received wide acclaim in both the North and the South. As a result, Yale awarded Longstreet an honorary doctorate in 1841. *See* JOHN DONALD WADE, AUGUSTUS BALDWIN LONGSTREET 149-156 (1924).

[12] The level of Lamar's formal education prior to entering Emory can be inferred from the list of examinations he was required to pass in order to gain admission. As described in the college rules, these were: "Grammars of the Greek and Latin Languages, including Rules and Prosody. Caesar—5 Books of the Gallic War, and the Civil War entire. Cicero's Orations against Catcline, and for Archais and Marcellus. Virgil's Aeneid 6 Books and Bucolics. Latin Exercises. Jacob's Greek Reader. Xenophon's

history and the classics is evident in speeches he made years later.

By the time Lamar was admitted to the Georgia bar in 1847, two ideas were gaining wide acceptance in his world, both strongly endorsed by Longstreet: first, that a state had the authority to withdraw from the Union; and second, that slavery was not simply a necessary evil to be tolerated, as had been thought a few decades earlier, but was affirmatively beneficial. Those twin ideas came to be as pervasive and as unavoidable as the air he breathed. Their growing momentum, fueled ironically by the abolitionist movement in the North, would eventually take Lamar and Southern society to war and defeat.

II. THE ROAD TO DISASTER

For Lamar, the decade and a half from his Emory graduation to the outbreak of war was a restless period. He had trouble finding himself, as we would say today. Caught between the pull of his dead father and the attractions of his living father-in-law, he was back and forth between Georgia and Mississippi, where Judge Longstreet had become President of the University at Oxford. In the end, the latter prevailed, and Lamar settled in Mississippi to stay.

On his final return from Georgia, he bought eleven hundred acres of land north of Oxford along the Tallahatchie River, a place appropriately named Solitude. There he lived with his family as a virtual recluse, doing much reading and, for the only time in his life, presiding over a farming operation. Eventually he reemerged and formed a law partnership in Holly Springs. Having left a favorable impression on the politicians during his earlier stay in Oxford, he now came to their renewed attention. He particularly impressed Jacob Thompson, the district's former Congressman and then Secretary of the

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Anabasis 4 Books. Fisk's Greek Exercises. They [candidates for admission] shall be versed in the first four Rules of Arithmetic, the Rule of Three Direct and Inverse, Vulgar and Decimal fractions, and the Extraction of the Roots, Interest and Annuities, Algebra through Simple Equations, Geography." HENRY MORTON BULLOCK, A HISTORY OF EMORY COLLEGE 63 (1936).

Interior in President Buchanan's cabinet. As a result, Lamar was put up for Congress and was elected on the Democratic ticket.

In December, 1857, at the age of thirty-two, Lamar arrived in Washington for the first time and took his seat in the House of Representatives. There he found anti-slavery sentiment, and the Southern reaction to it, to be at such a pitch that the mood on both sides to compromise, to seek some settlement, was evaporating. Lamar's views and actions during the deepening crisis are difficult to interpret. Although he clearly believed that the constitutional protections accorded slavery were threatened by the abolitionists and that the states had a right to secede if necessary, he seemed ambivalent about the proper course of action. One of his biographers has called him a "reluctant secessionist."[13] He did not call for secession immediately after Lincoln's election; he wanted to put off the decision until the following March 4, Inauguration Day. However, when the momentum for earlier action became irresistible, he joined in and, as was his nature, assumed a leadership role. He drafted the Mississippi Ordinance of Secession and joined his law partner in organizing the 19th Mississippi Regiment. But he seems to have been under no illusions as to what lay ahead. He said, with prophetic insight, "[d]issolution cannot take place quietly . . . . When the sun of the Union sets it will go down in blood."[14]

Thus the irreconcilable conflict moved to the battlefield, the only controversy in our history that could not be resolved through law and representative government. Lamar gave the Confederacy his full support. He performed four quite different roles, demonstrating the variousness and versatility that marked his entire life: a colonel commanding an infantry regiment, a political troubleshooter for President Jefferson Davis, a Confederate diplomat in Europe, and a judge on a military court. By another of those happenstances of fate that often placed him on the scene of great historical events, he was at Appomattox Courthouse on April 9, 1865, with his wife's cousin, Gen. James Longstreet, to surrender with the Army of Northern Virginia. He there acquired a new status: a paroled prisoner of war. In that capacity he returned home to Oxford.

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[13] REEVES, *supra* note 1, at ii.

[14] Letter from Lamar to B. S. Rozell (March 8, 1858), *in* MAYES, *supra* note 1, at 73.

The impact of the war on Lamar personally had been heavy and disastrous. Both of his brothers and both of his Holly Springs law partners, all officers in the Confederate Army, had been killed. Among his relatives in Georgia, fourteen Lamar men had died as Confederate Army officers. The devastation he saw around him was immense—miles of railroad tracks and levees destroyed, thousands of mules and other livestock gone, and buildings, houses, and fences wrecked.[15] The entire center of the town of Oxford had been burned down.

Despite all these losses, the war had provided Lamar with an extraordinary educational experience. The political and social life in Richmond, his foray into actual combat at the Battle of Williamsburg, and the suffering he saw in those last months from Petersburg to Appomattox must surely have deepened his insights into the human condition. No doubt a high point for Lamar educationally was his European venture. For six months he traveled back and forth between London and Paris assisting in the effort to gain diplomatic recognition for the Confederacy. This was indeed a rare and enlightening opportunity in an era when only a tiny percentage of Americans visited Europe.

What bore down heavily on Lamar, as he came home to Oxford from Appomattox, was the realization that he had been a leader in the course of action that had brought his state and region to this calamitous end. He took the position that those who had been responsible for this condition should not again attempt to lead. For a while he withdrew, becoming reclusive and falling into moods of despair and hopelessness. Those who recalled his father's suicide were concerned that Lamar himself might be teetering on the brink of that abyss. The curtain had dropped, but it would rise again. For Lamar, at the age of 39, one life was over; another was about to begin. The depths of despair turned out to be a prelude to the career that causes us to honor Lamar on the centennial of his death.

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[15] JAMES WILFORD GARNER, RECONSTRUCTION IN MISSISSIPPI 122-138 (1964).

III. The Law

Before addressing Lamar's main claim to fame as sectional reconciler, I wish to focus on Lamar as lawyer, using that word in its broadest sense. The quality of his legal mind can be inferred from his work as law teacher and from his speeches and official writings, rather than from his sporadic forays into law practice. Whatever the setting, though, his power of reasoning, oratorical ability, and personality made him an effective advocate.

Teaching the entire law school curriculum for four years at the University of Mississippi, as Lamar did, surely suggests a greater than average interest in the academic side of law. But his intellectual interests were broader. At different times prior to his law professorship, he held three teaching posts on the University of Mississippi faculty—one in mathematics, one in mental and moral philosophy, and one in ethics and metaphysics. His interest in education long survived his teaching days. When Vanderbilt University was established, he became a member of its governing board and served as the board's vice-president from 1875 to 1888.[16] He spoke often in support of education. In one of his best known Senate speeches, he advocated federal aid for the public schools, a novel idea at the time.[17]

It is difficult for us in the late twentieth century to imagine the world in which Lamar and his law students found themselves in those years from 1866 to 1870. The political theory to which he had devoted much thought and energy was gone; the force of arms had decided that a state could not withdraw from the Union. The social and economic order they had known existed no more. Lamar and virtually all Southern leaders were disenfranchised and barred by federal law from holding public office. The state was under military government; it had no representatives or senators in Congress. For Lamar, the challenge was to adjust law and political theory to the new reality.

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[16] Vanderbilt Register, 1875-1881; Vanderbilt Register, 1881-1888 (Heard Library, Vanderbilt University).

[17] 15 Cong. Rec. 2368-71 (1884), *reprinted in* Michael H. Hoffheimer, *L.Q.C. Lamar, 1825-1893*, 63 Miss. L.J. 5, 51-60 (1993).

It is interesting to speculate to what extent, under those peculiar circumstances, Lamar went beyond the technical doctrines that formed the core of the curriculum to engage in broader explorations of public law and political theory. The evidence suggests that he did address such matters in some fashion.[18] For example, one of his students—he never had more than two dozen at any one time—said that he discussed "great themes—questions that were vital to the nation, questions that inhered in the very structure of our government."[19] He seems to have been acutely aware of his responsibility to train his law students for a useful and honorable life amidst the radically altered circumstances. In speaking of his students, he said, "[u]pon them I have always endeavored to impress the belief that truth was better than falsehood, honesty better than policy, courage better than cowardice."[20]

Lamar's legal mind is best revealed in his speeches, those delivered in Congress and elsewhere on important occasions, usually on public law or constitutional issues of great moment. In his very first speech in Congress, delivered in 1858 during the debate over the admission of Kansas as a state, he addressed the hotly contested question of whether the state's Constitution had been legally adopted by a convention or whether it was necessary to submit it to a vote of the people. In arguing for acceptance of the constitution, he skillfully invoked an analogy from the law of agency. Asserting that the delegates to the convention were agents of the people, the people being their principal, and that the delegates had the usual authority of agents to bind their principal, he argued that ratification by the principal was not necessary.[21]

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[18] The story of Lamar's law professorship is told in Daniel J. Meador, *Lamar and the Law at the University of Mississippi*, 34 MISS. L.J. 227 (1963).

[19] GALLOWAY, *supra* note 2, at 223. Lamar held views about public virtue and patriotism similar to those expressed by Francis Lieber in the pre-war years, although the political positions of the two had not been the same. *See* Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. LEGAL ED. 339 (1992).

[20] 7 CONG. REC. 1061 (1878).

Another example of Lamar's legal reasoning is his defense in 1864 of the constitutionality of the Confederate Congress' suspension of the writ of habeas corpus. The measure had been attacked on the ground that the Congressional power to suspend the writ was conferred only by implication and thus could not be employed to infringe rights expressly guaranteed elsewhere in the Constitution. Lamar imaginatively demonstrated that the negative phrasing of the Suspension Clause[22] did not prevent its being an affirmative power expressly conferred on Congress. He drew on English history, among other sources, to show that the existence of individual rights was not inconsistent with the power to suspend the writ in the event of invasion or rebellion.[23]

Still another illustration can be seen in a speech he gave in the House of Representatives in 1877, during the Hayes-Tilden presidential election crisis.[24] He supported a bill to resolve the impasse by creating a bipartisan commission to determine the lawful vote returns from three Southern states.[25] He presented a careful analysis demonstrating that the constitutional direction to the House and the Senate to count the votes did not prevent the Congress, through its legislative power, from employing a commission as a means of ascertaining which votes should be counted.[26]

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[21] CONG. GLOBE, 35th Cong., 1st Sess. 279-81 (1858).

[22] "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Confederate States Constitution, Art. I, § 9, cl. 3, *quoted in* MARSHALL L. DEROSA, THE CONFEDERATE CONSTITUTION OF 1861: AN INQUIRY INTO AMERICAN CONSTITUTIONALISM 141 (1991). The clause was copied verbatim from the United States Constitution, as was most of the Confederate Constitution. DE ROSA, *supra*, at 7-17. The provisions of the amendments to the Federal Constitution were incorporated into the body of the Confederate Constitution. *Id.* at 57-58. The drafters of the latter took advantage of the opportunity to do an editorial job on the former, but to a high degree the two documents are the same. *Id.* at 79-99. The major difference is that the Confederate Constitution makes explicit the states'-rights views of the anti-Federalists of the 1780's and 90's. *Id.* at 23-24.

[23] MAYES, *supra* note 1, at 113-14. This speech was delivered in Atlanta. Lamar delivered essentially the same speech in Columbus and in the state capitol at Milledgeville.

[24] 5 CONG. REC. 997-99 (1877).

Although in less dramatic fashion, Lamar's legal mind can also be seen at work in his opinions as a Supreme Court Justice. He was on the Court only five years, but he wrote more than one hundred opinions,[27] in addition to the opinions he wrote while sitting on circuit.[28] Lamar himself undoubtedly did the research, analysis, and writing for all these opinions, as this was long before the advent of the modern style law clerk.

During most of Lamar's tenure the Court received cases directly from the trial level, as the courts of appeals did not come into being until 1891. Thus, a large portion of the cases were private law disputes involving commercial transactions, interests in land, and negligence actions. The docket also included many criminal and patent cases, as well as a variety of actions involving federal statutes. Many were technically complicated, types of cases rarely dealt with by the Supreme Court today. Lamar's opinions reveal his lawyering and analytical skills and show him to be at home with the craft of judging.[29]

Constitutional cases made up only a small part of the Court's business. Many involved questions under the Commerce Clause. Perhaps the most important case of this sort in which Lamar wrote the opinion was *Kidd v. Pearson*.[30] The

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[25] *Id.* at 998.

[26] *Id.* at 997-99.

[27] Lamar's Supreme Court opinions are listed in Hoffheimer, *supra* note 17, at 97-104. They are contained in volumes 125 to 145 of the United States Reports.

[28] The circuit opinions are listed in Hoffheimer, *supra* note 17, at 104-05.

[29] Professor Michael H. Hoffheimer has written interestingly about a case in which Lamar wrote the Court's opinion reversing a Massachusetts decision in which future Justice Oliver Wendell Holmes had written the opinion. Michael H. Hoffheimer, *Holmes, L.Q.C. Lamar, and Natural Law*, 58 MISS. L.J. 71 (1988). The case was Williams v. Heard, 140 U.S. 529 (1890).

[30] 128 U.S. 1 (1888).

Court there held unconstitutional an Act of Congress regulating the manufacture of alcohol.[31] The opinion articulated a distinction, in vogue for four decades thereafter, between manufacturing and interstate commerce.[32] In two other cases, Lamar wrote the Court's opinions invalidating state taxes under the Commerce Clause.[33]

Concurring and dissenting opinions were rare in those days. Lamar wrote one of his few concurring opinions in *Field v. Clark*,[34] taking the position that a statute which authorized the President to make certain findings under which import duties would be fixed was an unconstitutional delegation of legislative authority.[35] Chief Justice Fuller joined that opinion.

One of his few dissents—and perhaps his best known opinion—came in *In Re Neagle*.[36] Lamar concluded that the habeas corpus statutes did not authorize a federal court to release a federal marshal being held by state authorities on a homicide charge.[37]

A prominent theme running through Lamar's speeches, writings, and judicial opinions is his belief in the importance of adhering to constitutional and legal forms and structures. He believed that such adherence provided the surest protection of liberty and domestic tranquility. His participation in the secession movement was not inconsistent with that belief. He took the view, as did Southern leaders generally, that the Federal Constitution recognized and protected slavery, that the abolitionists were thus assaulting the Constitution itself, and that secession was therefore necessary to preserve the constitution as it was written. The secessionists, in other words, were the conservators of what the Founding Fathers had wrought; the revolution was coming from the North. One evidence of that view is that the Constitution of the Confederate States is a verbatim copy of the United States Constitution, with only a few variations.

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[31] *Kidd*, 128 U.S. at 25-26.

[32] *Id.* at 24.

[33] McCall v. California, 136 U.S. 104 (1890); Norfolk & Western R.R. v. Pennsylvania, 136 U.S. 114 (1890).

[34] 143 U.S. 649, 697 (1892) (Lamar, J. & Fuller, C.J., concurring).

[35] *Field*, 143 U.S. at 697-700 (Lamar, J. & Fuller, C.J., concurring).

[36] 135 U.S. 1, 76 (1890) (Lamar, J. & Fuller, C.J., dissenting).

[37] *Neagle*, 135 U.S. at 76-99 (Lamar, J. & Fuller, C.J., dissenting).

IV. NATIONAL RECONCILIATION

Lamar's role as sectional reconciler is what commends him most of all to later generations and ensures him a place in the history books. His effectiveness in that role was due in part to his unusual personality, oratorical skill, and integrity. A highly important factor, however, was his antebellum and Confederate background. Here was no marginal Southerner, no dissenter or hill country Union sympathizer, but a man born and reared in the cotton planter society, an articulate spokesman for the dominant Southern interests in the pre-war Congress, and a Confederate officer. When he spoke of reconciliation, when he urged his fellow Southerners to accept the outcome of the war, when he asked Northerners to accept their Southern compatriots back into the fold as fellow citizens of a reunited nation, the country took notice. He had a credibility on such matters that was unusual.

The story of Lamar as reconciler begins with the death of Senator Charles Sumner of Massachusetts in 1874. A year and a half earlier Lamar had been sent back to Congress from his old Mississippi district, having reached a decision, after seven years of obscurity, to reenter public life because of his growing concern over the direction of public affairs. Charles Sumner was one of the South's archenemies. Before the war he had been physically caned down on the Senate floor by a South Carolina Congressman. Now, at a Sumner memorial ceremony in the House of Representatives, Lamar appeared as one of the speakers. He saw the occasion as a unique opportunity to have the ear of the North and to gain credibility in order to put the South in a better light with Northern interests. He took a calculated risk to achieve that end, a risk of alienating his constituents and of undermining himself at home.

The speech he gave on the floor of the House, perhaps the best known of all his speeches, was a remarkable performance. In passages exhibiting his command of the English language, Lamar described Sumner's actions, character, and qualities of mind in words that could be taken as high praise by his Northern admirers, but which also captured the reasons why he was detested by many Southerners. The speech was so skillfully phrased that each side could see its views of the deceased man embodied in it. It concluded dramatically with its most quoted line: "My countrymen, *know* one another, and you will *love* one another."[38]

The speech had the intended effect. Newspapers all over the North praised Lamar. Moreover, it did him no lasting political damage in his home district. Lamar now had the attention of the nation. The South had a spokesman to which the North would listen. To dispel Northern distrust of the South without alienating the folks back home was no small feat. Yet in the years that followed, Lamar spoke and acted often with success in pursuit of that reconciling objective.

One example is his speech in the Senate in support of a bill to restore Ulysses S. Grant to the Army pension roll. When Grant had become president, he had been removed from the army retired list and thus was not eligible to receive retired pay after his presidency. One can imagine the impression made on the minds of Union Army veterans throughout the North by the spectacle of an ex-Confederate officer describing Grant as a great soldier and urging his restoration to the retired roll.[39]

Another example of Lamar's reconciling role is his course of action in the Hayes-Tilden election dispute. After the Congressionally-established commission, which Lamar had supported, awarded the contested votes from all three states to the Republican candidate Hayes, the Tilden supporters were in an uproar, believing that those votes rightfully belonged to the Democratic candidate. Lamar was convinced that civil war was a real possibility, so he backed the Commission's findings, despite Southern sentiment to the contrary.[40]

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[38] 5 CONG. REC. 3411 (1874), *reprinted in* Hoffheimer, *supra* note 17, at 42-49.

[39] 11 CONG. REC. 901 (1881).

[40] A detailed study of this controversy is presented in C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1951).

In his address at the dedication of the monument to John C. Calhoun in Charleston, South Carolina, twenty-two years after the war, Lamar again demonstrated his unusual ability to speak in reconciling tones while not turning his back on his heritage. In this respect, Calhoun presented quite a challenge, but Lamar rose to the occasion. He told the assembled crowd that if Calhoun were still here, he would say to South Carolina "that, the great controversy being closed at the ballot box, closed by the arbitrament of war, and, above all, closed by the constitution . . . she sacrifices no principle and falsifies no sentiment in accepting the verdict . . . . " He went on to say: "[A] people who in form surrender and profess to submit, yet continue to secretly nurse old resentments . . . will sooner or later degenerate into baseness and treachery . . . ."[41]

Lamar had his critics and opponents, and he was often attacked politically. There were those who accused him of selling out the South, and there were those who accused him of being opportunistic and duplicitous, of saying one thing in Washington and another in Mississippi. The controversies and debates about what really happened in that turbulent Reconstruction era and who was right or wrong may never be satisfactorily resolved.

Suffice it to say that in the years after his return to Congress in 1872, Lamar consistently pursued two objectives. One was to restore the South as a respected and fully accepted participant in the life of a reunited nation. The other was to restore what he viewed as responsible, constitutional government in his state. In pursuing those objectives, he usually invoked lofty sentiments and spoke in high-minded and conciliatory tones. Only occasionally when the South was under attack by Republicans did he show anger or speak sharply.

A new opportunity was provided Lamar in his drive for Northern acceptance of the South when he was appointed Secretary of the Interior by President Cleveland in 1885. The prospect of an ex-Confederate heading the department that administered pensions for Union Army veterans was disturbing to many Northerners. Once he took office, however, those apprehensions were dispelled. He said, "I can administer the Department with honesty and efficiency and fairness to all parts of the country. I think it may go far toward convincing the people that the South desires to serve the best and highest interest of a common country."[42]

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[41] Lucius Q.C. Lamar, An Oration Delivered Before the Ladies' Calhoun Monument Association and the Public at Charleston, S.C. (April 26, 1887), *in* MAYES, *supra* note 1, at 784.

The last step in the saga of Lamar as the apostle and symbol of reunion came three years later with his nomination to the United States Supreme Court. Although he had been widely acclaimed in the Northern Press for years for his efforts toward healing the wartime breach, political opposition developed. To some Northerners no one who had worn the Confederate gray could be trusted to interpret the Thirteenth, Fourteenth, and Fifteenth Amendments. Also, it was a presidential election year, and many Republicans saw possible political advantage by waving the "bloody shirt" once more. The nomination hung in the balance for weeks, but in the end the Senate confirmed Lamar by a three-vote margin.[43] He took his seat on January 18, 1888, at the age of sixty-two, symbolizing, as nothing else could, that the South was once more a full partner in all three branches of the national government.

V. CHARACTER AND THE LEGACY

Lamar would not have been as effective in all that he did had it not been for his character. In defining human character, dictionaries use words such as moral firmness, moral excellence, honesty, courage, and integrity. Definitions of character and integrity overlap. For example, the *Oxford English Dictionary* defines integrity as "the character of uncorrupted virtue, [especially] in relation to truth and fair dealing; uprightness, honesty, and sincerity."[44]

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[42] Letter from Lamar to E.C. Walthall (Feb. 3, 1885), *in* REEVES, *supra* note 1, at 138.

[43] The confirmation fight is described in Daniel J. Meador, *Lamar to the Court: Last Step to National Reunion, Yearbook 1986*, 1986 Y.B. SUP. CT. HIST. SOC'Y 27.

Whatever definition one chooses, Lamar, as I see his life in its totality, was a man of strong character and integrity. He spoke often of the importance of truth and honesty in both public and private affairs, and he strove to live in accordance with those ideals. He believed that public office is a public trust, and that a public official must act in the best interests of the country and the people, even though such action may be contrary to what the people think at the moment.

The best known example of Lamar's acting on this concept is his vote in the Senate against the so-called "silver bill," a proposal to authorize the coinage of silver. The proposal was popular in Mississippi where it was seen as a means of alleviating economic distress. Lamar had already made a speech explaining why he believed the bill to embody unsound monetary policy. It was a moment of high drama when Lamar rose on the Senate floor, holding in his hand resolutions adopted by the Mississippi legislature directing him to vote for the bill. This was no small matter, for in those days state legislatures elected the senators. After the resolutions were read to the Senate, Lamar announced that he must disobey the instructions, saying, "between these resolutions and my convictions there is a great gulf. I cannot pass it." Recalling what he had said to his students about truth, honesty, and courage, he continued "[t]o-day my lessons confront me. To-day I must be true or false, honest or cunning, faithful or unfaithful to my people . . . . I cannot vote as these resolutions direct."[45] Despite a firestorm of criticism back home, Lamar survived politically and was reelected to the Senate. This episode earned him a chapter in John F. Kennedy's *Profiles in Courage*.[46]

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[44] 5 THE OXFORD ENGLISH DICTIONARY 368 (1933).

[45] 7 CONG. REC. 1061 (1878).

[46] JOHN F. KENNEDY, PROFILES IN COURAGE, ch. 7, 152-77 (1955). The chapter also describes Lamar's Sumner eulogy and his role in the Hayes-Tilden election controversy. *Id.* at 163-64. The chapter concludes that Lamar has been properly called "the most gifted statesman given by the South to the nation from the close of the Civil War to the turn of the century . . . ." *Id.* at 177.

When asked how Lamar maintained his hold on the people of Mississippi, an observer said that "it was the grandeur of the man, intellectually and morally, that wooed and won them."[47] Lamar himself once said, "[s]trength of mind and force of character are the supreme rulers of human affairs."[48]

One measure of character and inner strength is the way in which one responds to adversity. Lamar had adversities in abundance. First, there was the calamity of the Civil War. His loss of family, friends, and property and the humiliation of defeat could have crushed him. Indeed he did withdraw altogether for a while. Yet he came back to many years of constructive leadership. Then, illness plagued him for the last three decades of his life. Several times he was disabled by apoplectic attacks. In later years he was afflicted with a variety of maladies, although his condition was little known to the public at the time. Yet he kept going, performing his legislative, cabinet, and judicial duties, but at times feeling so bad that he declined all social engagements. A lesser man might have given up. His life demonstrates that one can often be down but never out.

Another measure of character is how one deals with his past. A person of integrity will not seek to evade responsibility for bygone actions that did not turn out well and will not disassociate himself from old friends who are now out of fashion with others. Lamar did not attempt to gloss over or minimize his involvement in the secession movement. He was unembarrassed to state publicly years after the war that he and the other Southern leaders had acted in defense of constitutional principles inherited from the founding fathers.[49]

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[47] William M. Leftwich, *Lucius Q.C. Lamar*, 44 THE METHODIST REVIEW 67-68 (Sept-Oct., 1896).

[48] Lucius Q.C. Lamar, An Alumni Address Delivered Before the Society of the Alumni, at Emory College (June 24, 1880), *in* MAYES, *supra* note 1, at 801.

[49] One example is the following statement he made in the House of Representatives:

> [W]e undertook a great political movement which time and the fortunes of war disclosed that we had not the strength and resources to carry on to a successful consummation. Our vindication—and a generous victor will not deny us that—lies in our solemn conviction that we were defending the institutions and

Lamar's drive for reconciliation and Northern acceptance never led him to disavow the leaders of the Lost Cause. For example, he did not shrink from publicly defending Jefferson Davis. In responding to a proposal in the Senate to exclude Davis from a bill to provide pensions for Mexican War veterans, he said, "Jefferson Davis stands in precisely the position that I stand in, that every Southern man who believed in the right of a State to secede stands in."[50] On another occasion, he declared with unusual sharpness, "no man shall in my presence call Jefferson Davis a traitor without my responding with a stern and emphatic denial."[51] He was not concerned with being "politically correct," to use today's jargon.

Human perfection, of course, is not to be found on this earth. All fall short. However, looking back on what Lamar said and did through extraordinarily troubling decades, I give him high marks for character and statesmanship. He always held before himself and others the highest standards of honorable conduct, standards which he sought to live up to and which he expected others to observe, especially public servants. In this respect, he provides an exemplary model for law students, lawyers, and public officials in all times and places.

Lamar also provides a model for our time, and indeed for any time, in his role as reconciler. In his day the great schism was sectional. Today the divides run along racial, ethnic, and religious lines. To overcome these and preserve the nation, we will need leaders with Lamar's strength of character, persuasive power, and high-minded reconciling spirit.

> the principles of constitutional liberty, the heritage of the fathers of the Republic. It was this sentiment which inspired the courage of our soldiers in battle and now renders our section all the more precious to us in defeat, giving her to our eyes at least dignity in her desolation and beauty and majesty even in her ruin and woe.

5 Cong. Rec. 999 (1877).

[50] 8 Cong. Rec. 2227 (1879). Demonstrating his facility in drawing on classical references, he pointedly addressed the attacker, Sen. George Hoar of Massachusetts: "When Prometheus was bound to the rock it was not an eagle—it was a vulture—that buried his beak in the tortured vitals of the victim." *Id.* at 2228.

[51] 16 Cong. Rec. 627 (1885).

In the Lamar Law Center at the University of Mississippi hangs a portrait of this remarkable man, painted in the last year of his life. In that soulful face, one can see the sadness and weariness of a man who experienced the central tragedy of American history, who knew both triumph and disaster as well as the darkness of despair and the sunlight of hope, a man of intelligence, wit, and charm who loved his family and his country and who devoted himself unstintingly to both.

Perhaps the best answer to the question I posed at the outset as to Lamar's enduring significance is found in the remarks of the Attorney General of the United States, Richard Olney of Massachusetts, at the proceedings in the Supreme Court in memory of Mr. Justice Lamar, held shortly after his death one hundred years ago. The attorney general summed up the essence of Lamar's legacy to posterity when he said, "to him more than to any other one man, North or South, is due the adoption by both the victors and vanquished of those counsels of moderation, magnanimity and wisdom which have made the edifice of our constitutional Union more impregnable to all assault than ever before."[52]

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[52] *In Memoriam, supra* note 5, at 709. Justice Lamar died at Macon, Georgia, on January 23, 1893. *Id.* at 707. Interment was initially in Macon with re-interment a year later in St. Peter's Cemetery, Oxford, Mississippi.

FINANCING A SMALL BUSINESS IN MISSISSIPPI: A PRACTITIONER'S GUIDE TO FEDERAL AND STATE SECURITIES EXEMPTIONS

PART I†

Bryn Vaaler[*]

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† *This article is being published in two parts. Part I contains Section I (Introduction) and Section II (Development and Current Status of Regulation D under the Securities Act). Section III (Other Principal Securities Act Exemptions for Small Business Financing) and Section IV (Mississippi Blue Sky Exemptions for Small Business Financing) will be published as Financing a Small Business In Mississippi: A Practitioner's Guide to Federal and State Securities Exemptions (Part II),* 63 Miss. L.J. 267 (1994) *[hereinafter Financing a Small Business (Part II)].*

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I. INTRODUCTION

Legal practice in a small town in Mississippi may seem a world apart from Wall Street. While the vast majority of Mississippi practitioners do not regularly handle public stock offerings, mergers and acquisitions or tender offers, their day-to-day work still requires knowledge of federal and state securities laws.[1] The most routine pieces of business and transactional work (*e.g.*, incorporation and initial stock issuance, sale of a family business, formation of a limited partnership) involve the offer and sale of securities.[2] Under the

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[1] The federal securities laws consist of the six principal statutes administered by the Securities and Exchange Commission (SEC) and the rules, regulations and decisions relating to them. The six principal statutes are: the Securities Act of 1933 (Securities Act), 15 U.S.C. §§ 77a-77aa (1988 & Supp. III 1991); the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. §§ 78a-78jj (1988 & Supp. III 1991); the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79a to 79x-6 (1988 & Supp. IV 1992); the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbb (1988 & Supp. II 1990); the Investment Company Act of 1940 (Investment Company Act), 15 U.S.C. §§ 80a-1 to -52 (1988 & Supp. III 1991); and the Investment Advisers Act of 1940 (Investment Advisers Act), 15 U.S.C. §§ 80b-1 to 80b-21 (1988 & Supp. III 1991). This article focuses almost entirely on the Securities Act, with frequent references to the Exchange Act and a few references to the Investment Company Act. For broader or more in-depth coverage of the federal securities laws, readers may consult a number of important secondary sources. The authoritative work on the subject is the multi-volume treatise LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION (3d ed. 1989 & Supp. 1992). Other

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significant casebooks, hornbooks and treatises include: JAMES D. COX ET AL., SECURITIES REGULATION—CASES AND MATERIALS (1991); THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION (2d ed. 1990); J. WILLIAM HICKS, EXEMPTED TRANSACTIONS UNDER THE SECURITIES ACT OF 1993, vols. 7-7D, SECURITIES LAW SERIES (rev. ed. 1993); RICHARD W. JENNINGS, ET AL., SECURITIES REGULATION—CASES AND MATERIALS (7th ed. 1992); LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION (2d ed. 1988 & Supp. 1992).

In addition to the federal securities laws, each of the 50 states, the District of Columbia, Guam and Puerto Rico have their own securities laws, commonly referred to as "blue sky laws." 1 LOSS & SELIGMAN, *supra*, at 39; *see* JENNINGS, ET AL., *supra*, at 1617. State securities regulation predates federal regulation. The first comprehensive state securities law statute was adopted by Kansas in 1911. LOUIS LOSS & EDWARD M. COWETT, BLUE SKY LAW 5 (1958); *see* 1 LOSS & SELIGMAN, *supra*, at 34; *see also* Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 359-62 (1991) (analyzing reasons for advent of state regulation). By 1933, securities laws had been adopted in 47 states and in Hawaii. LOSS & COWETT, *supra*, at 17; 1 LOSS & SELIGMAN, *supra*, at 39. While Congress might have chosen to preempt the field of securities regulation upon adoption of the Securities Act in 1933, it chose instead to reserve explicitly the right of the states to continue regulating. Securities Act § 18, 15 U.S.C. § 77r (1988); *see* 1 LOSS & SELIGMAN, *supra*, at 39-41.

Modern blue sky statutes vary significantly from state to state. An extremely important unifying influence, however, has been provided by the Uniform Securities Act (Uniform Act) promulgated by the National Conference of Commissioners on Uniform State Laws in 1956. 1 Blue Sky L. Rep. (CCH) ¶ 5500A-5573, at 1503-79; *see also* LOUIS LOSS, COMMENTARY ON THE UNIFORM SECURITIES ACT (1976) (containing official commentary to Uniform Act along with lengthier draftsmen's commentary). The Uniform Act, which was drafted under the direction of Professor Louis Loss, has been adopted in whole or in part in 41 states and territories, including Mississippi. 1 Blue Sky L. Rep. (CCH) ¶ 5500, at 1503 (listing states and territories that have adopted Uniform Act). The Mississippi version of the Uniform Act (Mississippi Securities Act) appears at MISS. CODE ANN. § 75-71-101 to -735 (1991).

[2] Federal and state securities laws define "security" broadly and in nearly identical terms. *See* Securities Act § 2(1), 15 U.S.C. § 77b(1) (1988); Exchange Act § 3(a)(10), 15 U.S.C. § 78c(a)(10) (1988); Uniform Act § 401(l), 1 Blue Sky L. Rep. (CCH) ¶ 5541, at 1552; MISS. CODE ANN. § 75-71-105(l) (1991). *See generally* 2 LOSS & SELIGMAN, *supra* note 1, at 869-1083. "Stock" is explicitly included in the definitions along with certain other specific categories of instruments commonly thought of as securities, such as any "note," "bond" or "debenture." *See* Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985) (stock bearing normal attributes of stock always "security" for purposes of federal securities laws); Reves v. Ernst & Young, 494 U.S. 56 (1990) (all "notes" presumed to be "securities" for purposes of federal securities laws unless they bear "family resemblance" to certain types of notes not warranting treatment as securities).

Securities Act of 1933 and the Mississippi Securities Act, such offers and sales must be registered, or they must comply with

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In addition to these specific categories, the federal and state definitions also include generic and descriptive terms, such as "investment contract" and "certificate of interest or participation in any profit-sharing agreement." In SEC v. W. J. Howey Co., 328 U.S. 293 (1946), the United States Supreme Court held that the "investment contract" element may encompass arrangements beyond the "ordinary concept of security" where four elements are present: (1) an investment, (2) in a common enterprise, (3) with an expectation of profits, (4) resulting solely from the efforts of others. *Howey*, 328 U.S. at 298-99; *cf.* Mississippi Blue Sky Rule 103(H), 2 Blue Sky L. Rep. (CCH) ¶ 34,403, at 29,401-03 (defining "investment contract" as "any interest or participation in a contract, transaction, scheme, common enterprise, or profit-seeking venture whereby a person invests therein and looks primarily to the promoter or a third-party for the financial success of such venture"). *See generally* Park McGinty, *What is a Security?*, 1993 WIS. L. REV. 1033, 1047-53, 1069-80 (discussing *Howey* and *Reves* tests).

Based upon *Howey*, a limited partnership interest is almost invariably an "investment contract." Limited partnership interests are explicitly included as an additional specific category in the Mississippi Securities Act definition. MISS. CODE ANN. § 75-71-105(l) (1991). General partnership and joint venture interests may also constitute "investment contracts" in certain circumstances under the *Howey* test. *See generally* Joseph C. Long, *Partnership, Limited Partnership and Joint Venture Interests as Securities*, 37 MO. L. REV. 581 (1972); Marc H. Morgenstern, *Real Estate Joint Venture Interests as Securities: The Implications of* Williamson v. Tucker, 59 WASH. U. L.Q. 1231 (1982). The *Howey* test has also been found to encompass, under certain circumstances, a wide variety of other commercial and contractual arrangements that most people would not normally think of as securities, including condominiums and time-shares, warehouse receipts, animal breeding and feeding programs and franchise, pyramid sales and multi-level distributorship arrangements. *See generally* Carl W. Schneider, *The Elusive Definition of a "Security"—1990 Update*, 24 REV. SEC. & COMMODITIES REG. 13 (1991).

Case law interpreting the Mississippi definition of "security" has been limited. *See, e.g.*, State v. Russell, 358 So. 2d 409, 411-12 (Miss. 1978) (negotiable promissory note as "security" under different provision of predecessor statute). The Mississippi Secretary of State, pursuant to its authority in MISS. CODE ANN. § 75-71-111(e) (1991), however, has issued a number of opinions interpreting the Mississippi definition, including: *Lawrence/Mitchell Capital Management Group, LTD*, Feb. 25, 1991 (interests in investment trust formed to acquire tax certificates at tax sales could be "securities"); *Academy Financial Services of Miss., Inc.*, Dec. 17, 1990 (stating that subordinated loan agreement not "security"); *Producers Feed Co.*, Aug. 24, 1990 (common stock and patronage equities of farmers' cooperative organized as Mississippi business corporation not "security"). *See* L. Keith Parsons, *A Review of Interpretive Opinions and Enforcement Proceedings under the Mississippi Securities Act*, 12 MISS. C. L. REV. 179, 181-83 (1991). For further discussion of the Secretary of State's interpretive opinions and "no-action" letters, their role under the Mississippi Securities Act and how they may be requested, see *infra* notes 577-78 and accompanying text in *Financing a Small Business (Part II)*.

an available exemption from registration.[3] Offer and sale of a security without registration or an available exemption may result in liability to the buyer for damages or rescission (*i.e.*, the seller's obligation to buy back the security for the price paid plus interest).[4] It may also result in injunction,[5] civil penalty[6]

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[3] Section 5 of the Securities Act requires a registration statement to be in effect or on file with the SEC in order to lawfully sell or offer to sell a security in interstate commerce. 15 U.S.C. § 77e(c) (1988). The exemption provisions of the Securities Act are contained in § 3, entitled "Exempted Securities," and § 4, entitled "Exempted Transactions." 15 U.S.C. §§ 77c-77d (1988). The SEC has broad rulemaking authority under the Securities Act pursuant to which it enacts rules and regulations delineating and detailing the registration requirement and the exemptions therefrom. *See* Securities Act §§ 3(b), 3(c) & 19, 15 U.S.C. §§ 77c(b), 77c(c), & 77s (1988).

The analogous registration requirement under the Mississippi Securities Act is contained in § 75-71-401 of the Mississippi Code. Exempt securities under the Mississippi Securities Act are delineated in § 75-71-201, and § 75-71-203 provides for exempt transactions. MISS. CODE ANN. §§ 75-71-201 & 75-71-203 (1991). Administration of the Mississippi Securities Act is vested in the Secretary of State. MISS. CODE ANN. § 75-71-107(a) (1991). The Secretary of State has broad rulemaking authority under § 75-71-109 and specific authority with respect to transactional exemptions in § 75-71-203(13). The transactional exemptions available for small business financing under the Mississippi Securities Act and related rules of the Secretary of State are discussed in Section IV of this article, *Financing a Small Business (Part II).*

In addition to providing for the registration of the offer and sale of securities, federal and state securities laws require registration as broker-dealers of persons involved in offering and selling the securities. *See* Exchange Act § 15(a)(1), 15 U.S.C. § 78o(a)(1) (1988); MISS. CODE ANN. § 75-71-301 (1991). Such registration requirement may apply to issuer officials and employees engaged in offering and selling issuer securities. For a discussion of the applicability of such requirements to issuer personnel, see 1 LOSS & SELIGMAN, *supra* note 1, at 79-89 (state law) and 6 LOSS & SELIGMAN, *supra* note 1, at 2985-95 (federal law). Exemptions from the broker-dealer registration requirements vary from state to state and may not parallel federal exemptions. *Id.* For discussion of opinions of the Mississippi Secretary of State interpreting the definitions of "agent" and "broker-dealer" under § 75-71-105 of the Mississippi Code, to exclude officers of the issuer selling stock if they receive no commission, see Parsons, *supra* note 2, at 180. An exemption from registration for the offer and sale of the security *does not* in itself mean that the selling person is exempt from the federal or state broker-dealer registration requirements. Broker-dealer registration requirements and the exemptions therefrom are beyond the scope of this article.

[4] Section 12(1) of the Securities Act provides that:

> Any person who . . . offers or sells a security in violation of section 5 . . . shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages

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if he no longer owns the security.

15 U.S.C. § 77l(1) (1988). Analogous civil liability provisions for damages or rescission are contained in Uniform Act § 410(a)(1), 1 Blue Sky L. Rep. (CCH) ¶ 5550, at 1566-67, and MISS. CODE ANN. § 75-71-717(a)(1) (1991).

Seller liability for failure to comply with registration requirements under these provisions is basically absolute. *See generally* 9 LOSS & SELIGMAN, *supra* note 1, at 4188-97. The buyer is not required to prove any untrue statement or omission — just failure to register. *Id.* at 4190-91. The seller's intent and knowledge of the violation are entirely irrelevant. *Id.* at 4191.

[5] Section 20(b) of the Securities Act authorizes the SEC to bring an action for injunctive relief (temporary restraining order, preliminary injunction, or permanent injunction) in any federal district court "[w]henever it shall appear to the [SEC] that any person is engaged or about to be engaged in any acts or practices which constitute or will constitute a violation of the provisions of [the Securities Act,] or of any rule or regulation prescribed under authority thereof." 15 U.S.C. § 77t(b) (1988); *see, e.g.*, SEC v. Ralston Purina Co., 346 U.S. 119 (1953); SEC v. W.J. Howey Co., 328 U.S. 293 (1946); SEC v. Koscot Interplanetary, Inc., 497 F.2d 473 (5th Cir. 1974). Other equitable relief, including disgorgement, asset freezes, and appointment of receivers or trustees may also be ordered in a § 20(b) action. *See generally* Ralph C. Ferrara, et al., *Hardball! The SEC's New Arsenal of Enforcement Weapons*, 47 BUS. LAW. 33, 67-75 (1991).

Analogous authority for state securities administrators is contained in Uniform Act § 408, 1 Blue Sky L. Rep. (CCH) ¶ 5548, at 1565, and MISS. CODE ANN. § 75-71-715(3) (1991).

[6] Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d)(2) (Supp. III 1991) authorizes the SEC to bring actions in federal court seeking imposition of civil penalties for Securities Act violations. Section 20(d) was added to the Securities Act by the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (SERPSRA), Pub. L. No. 101-429, 104 Stat. 931. SERPSRA significantly expanded the SEC's arsenal of enforcement weapons under the Securities Act, the Exchange Act, the Investment Company Act and the Investment Advisers Act. *See* Ferrara, et al., *supra* note 5, at 33-67. The court determines the amount of penalty to order under § 20(d) in light of the facts and circumstances of each case. Securities Act § 20(d)(2), 15 U.S.C. § 77t(d)(2) (Supp. III 1991). Congress adopted, however, a three-tiered structure for determining the maximum permissible penalty, with the gravity of the violation and the harm caused or threatened dictating the applicable maximum tier. *Id.* Section 20(d) explicitly provides that actions seeking to impose a civil penalty may be brought in addition to any other action the SEC is entitled to bring. Securities Act § 20(d)(3)(C), 15 U.S.C. § 77t(d)(3)(C) (Supp. III 1991). In SEC v. Karczewski, C.A. No. 91-2784 (S.D.N.Y. Apr. 24, 1991), Lit. Rel. No. 13034 (Oct. 9, 1991), Lit. Rel. No. 12845 (Apr. 24, 1991), for example, the SEC obtained judgments ordering the defendants to pay both $34 million in disgorgement and $15 million in civil penalties for selling securities in an unregistered, non-exempt public offering to more than 1200 individuals. *See* Stephen M. DeTore & Judith L. Gelber, *Recent Enforcement Developments*, 25 REV. SEC. & COMMODITIES REG. 167, 169 n.8 (1992) (listing other injunctive and civil penalty actions brought for violation of Securities Act registration requirement).

The Uniform Act does not provide for civil penalties comparable to those created by SERPSRA. The Mississippi Securities Act, however, authorizes judicial and or cease-and-desist order,[7] suspension or revocation of broker-dealer registration,[8] or criminal penalties.[9]

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administrative imposition of civil penalties for violation of the registration requirement. *See* MISS. CODE ANN. § 75-71-715(2)-(3) (1991).

[7] The SEC's authority to issue permanent and temporary cease-and-desist orders relating to violations or threatened violations of the Securities Act (including violations of the § 5 registration requirement) is contained in new § 8A, 15 U.S.C. § 77h-1 (Supp. III 1991), which was added by SERPSRA. *See supra* note 6. *See generally* Ferrara, et al., *supra* note 5, at 56-65; John F. X. Peloso & Elizabeth A. Corley, *The SEC's Cease and Desist Powers*, 26 REV. SEC. & COMMODITIES REG. 11 (1993). For an example of the SEC's use of its new cease-and-desist authority to combat violations of § 5 of the Securities Act, see *In re* State Bank of Pakistan, Securities Act Release No. 6937, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. ¶ 84,946, at 82,711-13 (May 6, 1992). *See also* DeTore & Gelber, *supra* note 6, at 170.

The Uniform Act does not provide cease-and-desist authority comparable to that created by SERPSRA. The Mississippi Securities Act, however, authorizes the Secretary of State to issue such orders with or without a hearing against persons engaged in violations of the Act. *See* MISS. CODE ANN. § 75-71-715(1) (1991).

[8] As SEC-regulated persons, broker-dealers are subject, in addition to all the other enforcement tools available to the SEC, to administrative sanctions, including suspension or revocation of the broker-dealer's required registration. Such disciplinary actions are authorized under §§ 15(b)(4) and 15(b)(6) of the Exchange Act if the SEC finds, after notice and an opportunity for a hearing, that such sanctions are in the public interest and that the subject has engaged in certain specified conduct, including "willful" violation of the securities laws. 15 U.S.C. § 78o(b)(4)-(6) (Supp. III 1991). *See generally* Ferrara, et al., *supra* note 5, at 79-89. For examples of broker-dealer disciplinary proceedings relating to violation of the Securities Act registration requirement, see *In re* Carl M. Loeb, Rhoades & Co., 38 SEC 843 (1959); *In re* Ira Haupt & Co., 23 SEC 589 (1946). The "willfulness" requirement has been interpreted as meaning "no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949) (quoting Dennis v. United States, 171 F.2d 986, 990 (D.C. Cir. 1948)); *see also* 6 LOSS & SELIGMAN, *supra* note 1, at 3034 n.152.

Comparable authority to suspend or revoke broker-dealer registrations for willful violation of state securities laws is contained in Uniform Act § 204, 1 Blue Sky L. Rep. (CCH) ¶ 5524, at 1527-3 to 1530, and MISS. CODE ANN. § 75-71-321 (1991).

[9] Section 24 of the Securities Act provides for criminal penalties of not more than $10,000 or five years in prison for "[a]ny person who willfully violates any of the provisions of [the Securities Act], or the rules and regulations promulgated by the [SEC] under authority thereof." 15 U.S.C. § 77x (1988). For examples of criminal prosecutions for violation of the § 5 registration requirement, see United States v. Wolfson, 405 F.2d 779 (2d Cir. 1968), *cert. denied* 394 U.S. 946 (1969); United States v. Sherwood, 175 F. Supp. 480 (S.D.N.Y. 1959).

Criminal penalties for violation of state securities laws are set forth in Uniform Act § 409, 1 Blue Sky L. Rep. (CCH) ¶ 5549, at 1565-66, and § 75-71-735 of the Mississippi Code.

For the Mississippi practitioner whose work includes some business or transactional matters, a rudimentary knowledge of the exemptions to registration under federal and state securities laws is essential. Maintaining even a rudimentary knowledge, however, is a challenge. First, offers and sales must be exempt on both the federal and state levels,[10] making knowledge of two sets of exemptions necessary (assuming that only one state's laws are applicable to a particular transaction).[11] Second, the exemptions are imbedded in the structure and language of the federal and state securities laws generally, making it difficult to learn and understand them in isolation.[12] Third, exemptions, especially federal exemptions, change frequently, making it difficult to stay current if a practitioner does not follow the advance sheets and make a very concerted effort.[13]

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[10] *See supra* note 1. It is an axiom of the two-tiered system of securities regulation in the United States that an exemption from registration on the federal level does not ensure an exemption from registration on the state level, and *vice versa*. It is equally true that an offering conducted in accordance with an exemption from registration in one state does not ensure an exemption for offers and sales made in another state. Despite decades of effort to improve uniformity and coordination between federal and state exemptions and among the various states, significant disparities remain and continue to impose pointless economic burdens on capital formation.

[11] A multi-state offering requires consideration of more than one state's exemptions in addition to federal exemptions. *See* Uniform Act § 414, 1 Blue Sky L. Rep. (CCH) ¶ 5554, at 1571-33; MISS. CODE ANN. § 75-71-119 (1991). The choice-of-law and conflict rules governing which state's blue sky law applies to which particular offers and sales in a multi-state offering may be quite complex (for example, where a resident of one state receives an offer in a second state and signs a subscription agreement while visiting a third state). Given the uncertainties, it is often a practical necessity to ensure that exemptions are available for a particular offer and sale under more than one state's laws. *See generally* LOSS & COWETT, *supra* note 1, at 186-229. Choice-of-law and conflict rules governing blue sky laws are beyond the scope of this article.

[12] Competent use of the most important exemptions under the Securities Act, for example, requires familiarity with such difficult concepts as the "public" versus "nonpublic" nature of an offering, *see infra* notes 381-410 and accompanying text in *Financing a Small Business (Part II)*; general solicitation and advertising, *see infra* notes 300-36 and accompanying text; materiality, *see infra* notes 243-45 and accompanying text; integration, *see infra* notes 203-99 and accompanying text; and investment intent, *see infra* notes 337-62 and accompanying text. It also requires familiarity with the disclosure requirements of the principal registration statement forms under the Securities Act. *See infra* notes 207-52 and accompanying text.

The difficulty of dealing with exemptions from registration under federal and state securities laws is made even more acute by the burden of proof. A client relying on an exemption must not only comply with all conditions and requirements, but must also bear the burden of proving compliance if the exemption is ever challenged.[14] Clients are typically not in a position to sustain the burden of proof unless they have been counseled in advance.

From the perspective of the issuer-client, being counseled in advance means spending money before any offering proceeds come in the door. Compliance with federal and state securities laws is a transaction cost and an impediment to capital formation.[15]

The exemptions from registration are balancing points where federal and state securities laws set an equilibrium between the need to facilitate capital formation and the need to protect investors.[16] As the U.S. economy sputters and the U.S. capital markets compete with less regulated, foreign markets, the balance between ease of capital formation and investor protection has come under increasing scrutiny, especially insofar as the current balance may have a disproportionately adverse effect on the "cornerstone of the U.S. economy" — small business.[17] In 1992 and 1993, the SEC's Small Business

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[13] For example, four times since 1988, the SEC has substantially amended Regulation D, which contains three of the most important exemptions from registration under the Securities Act. *See infra* notes 38-51 and accompanying text.

[14] *See* SEC v. Ralston Purina Co., 346 U.S. 119, 126 (1953); Uniform Act § 402(d), 1 Blue Sky L. Rep. (CCH) ¶ 5542, at 1557-60; MISS. CODE ANN. § 75-71-207 (1991). *See generally* 3 LOSS & SELIGMAN, *supra* note 1, at 1145-49.

[15] *See* Securities Act Release No. 6924, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,931, at 82,483 (Mar. 11, 1992) [hereinafter Small Business Initiatives Proposing Release].

[16] *Id.* (stating that "[k]ey to the success of these proposals to reduce the impediments to small business financing in the securities markets is that the revisions do not compromise the basic protection of investors mandated by the federal securities laws").

[17] *Id.* at 82,482 (stating that "[t]he approximately 20 million small businesses in the United States employ more than half the domestic labor force, produce nearly half of the gross domestic product and created the vast preponderance of new jobs during the

Initiatives revamped exemptions as well as registration and reporting requirements under the federal securities laws expressly for the purpose of facilitating small business access to the public securities markets and reducing the cost of complying with federal securities laws.[18] The revisions were praised by some as helpful and characterized as mere "tinkering" by others calling for more extensive reform.[19]

While the SEC has searched for an appropriate balance on the federal level, state legislatures and securities law administrators have made efforts to keep pace with federal laws and to coordinate with federal exemptions. The North American Securities Administrators Association (NASAA)[20] has been

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period from 1988 through 1990. These small business are frequently in the vanguard of developing new technology, patents, products and services").

[18] *See* Securities Act Release No. 6949, 7 Fed. Sec. L. Rep. (CCH) ¶ 72,439, at 62,166 (July 30, 1992) [hereinafter 1992 Small Business Initiatives Amendment Release]; Securities Act Release No. 6996, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,134. at 84,118-35 (Apr. 29, 1993) [hereinafter 1993 Small Business Initiatives Amendment Release]. For a more complete description of the SEC's Small Business Initiatives, *see infra* notes 46-51 and 209-35 and accompanying text.

[19] One commentator has stated:

> The major problem is that these proposals, innovative as they may seem at first glance, continue to operate within an obsolete, tired framework that has outlived its usefulness. . . .
>
> It is time to stop tinkering. It is time to rethink the entire system. It is time to begin a special study of securities regulation of small business offerings that should assume that the present system does not work and that a thorough restructuring is both needed and possible.

Mark A. Sargent, *No More Tinkering!*, 1 BUS. L. TODAY 5, 7 (July-Aug. 1992). For a more charitable evaluation, see Ralph S. Janvey, *The SEC's Small Business Initiatives: Regulatory Reform or Shabby Conduct?*, 21 SEC. REG. L.J. 4 (Spring 1993).

[20] The North American Securities Administrators Association, Inc. is an organization comprised of securities regulators from 65 jurisdictions located in the United States, Puerto Rico, Canada and Mexico. Membership is voluntary. NASAA is not a regulatory organization. It has no mandatory powers over its members. NASAA promulgates uniform law provisions and forms for guidance of its members, however, and issues statements of policy and resolutions that have significant influence on what members do. Such materials are collected in the Commerce Clearing House looseleaf service *NASAA Reports*. For an overview of NASAA's other activities, see NASAA Rep. (CCH) ¶¶ 4-6, at 12-16.

instrumental in the effort to enhance uniformity and coordination with federal law.[21]

In line with these efforts, Mississippi has made a number of changes to its securities exemptions in recent years.[22] Despite these efforts, there remain important differences between the federal and state exemptions available for start-up and small business financing in Mississippi, as well as in other states. Restrictive state regulation continues to pose economic burdens on small businesses and lessen the practical impact of innovations on the federal level. NASAA's frustration in trying to work jointly with the SEC in development of the Small Business Initiatives illustrates the difficulties of coordinating the two-tier system of securities regulation in the United States.[23]

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[21] The most significant effort at improved uniformity and coordination to date began with a Congressional call for a cooperative effort between the SEC and NASAA to develop uniform state and federal exemptive schemes in the Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, 94 Stat. 2275. *See* Securities Act § 19(c), 15 U.S.C. § 77s(c) (1988). The SEC responded by adopting Regulation D in March 1982. Regulation D contains three of the most important exemptions from Securities Act registration and is the subject of Section II of this article. To coordinate the new Regulation D exemptions with state exemptions, NASAA adopted a final version of its Uniform Limited Offering Exemption (ULOE) in September 1983.

Because NASAA is a voluntary organization with no power to force states to comply with its uniform law proposals, each state has complete autonomy in accepting, rejecting or modifying NASAA recommendations. Since 1983, more than 35 states have adopted some form of ULOE or ULOE-based exemption, including Mississippi. For discussion of the Mississippi ULOE provision, *see infra* Section IV in *Financing a Small Business (Part II)*. Few states, however, have adopted the uniform exemption in unadulterated form. *See generally* 1 LOSS & SELIGMAN, *supra* note 1, at 133-48. In addition, the amendments made to ULOE since its adoption (primarily to accommodate changes in Regulation D) have provided individual states with further opportunity to tinker. The result has been a continuing lack of uniformity that has contributed to growing criticism of the two-tiered system of securities regulation in the United States and concern about the competitiveness and efficiency of over-regulated U.S. capital markets in the global economy of the 1990s and beyond. *See Breeden Calls for Unified Market to Meet Overseas Competitive Challenge*, 22 Sec. Reg. & L. Rep. (BNA) 351 (Mar. 9, 1990); *State Regulation Not Impediment to Globalization, NASAA Gathering Told*, 22 Sec. Reg. & L. Rep. (BNA) 1315 (Sept. 14, 1990). *See generally* Mark A. Sargent & Hugh H. Makens, *ULOE: New Hope, New Challenge*, 45 BUS. LAW. 1319 (1990); Ronald L. Fein, et al., *ULOE: Comprehending the Confusion*, 43 BUS. LAW. 737 (1988).

[22] *See generally, infra* Section IV in *Financing a Small Business (Part II)* (discussing development and current status of exemptions from registration most relevant to small business issuers under Mississippi Securities Act and related rules of Mississippi Secretary of State).

This article outlines the most important exemptions from registration under federal and Mississippi securities laws from the perspective of the Mississippi practitioner dealing primarily with start-up and small business financing.[24] Sections II and III cover development and current status of the most significant issuer exemptions under the Securities Act of 1933. Section II discusses in depth the three issuer exemptions that have been at the core of the federal exemptive scheme since 1982: Rules 504, 505 and 506 of Regulation D. Section III then covers more briefly three other important issuer exemptions under the Securities Act: the section 4(2) private placement exemption, the Rule 701 exemption for compensatory transactions and the intrastate exemption. Section IV covers the development and current status of the principal small business issuer exemptions under the Mississippi Securities Act and related rules of Mississippi's Office of the Secretary of State and makes suggestions aimed at improving the alignment of the Mississippi and federal exemptive provisions.

The purpose of this article is to provide a broad range of Mississippi practitioners with a substantial introduction to an area of law that, like it or not, is part of their daily practice.[25] This article is also intended to provide a framework for practitioners, their clients, legislators and regulators to assess whether investor protection and ease of capital formation have been appropriately balanced in Mississippi.

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[23] *See* Letter from Barry C. Guthary, North American Securities Administrators Ass'n, President-Elect and Director, Massachusetts Securities Division, to SEC (July 24, 1992), *in* SEC File No. S7-4-92, *cited in* Roger D. Blanc, *The Securities and Exchange Commission's Small Business Initiatives*, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES — 24TH ANNUAL INSTITUTE ON SECURITIES REGULATION 347 (1992).

[24] The registration requirements under federal and state securities laws apply to offers and sales by issuers ("primary" transactions) as well as to resales by security-holders ("secondary" transactions). This article focuses exclusively on exemptions available to issuers. Exemptions for secondary transactions are discussed only briefly in connection with the resale restrictions applicable to securities sold under Regulation D, § 4(2), Rule 701 and the intrastate exemption. *See infra* notes 337-62 and accompanying text.

[25] This article is intended primarily for use by lawyers. An example of how a practitioner might educate clients in this area is found in Marc. H. Morgenstern, *Private Placement Guidelines—A Lawyer's Letter to a First-Time Issuer*, 48 BUS. LAW. 257 (1992).

II. DEVELOPMENT AND CURRENT STATUS OF REGULATION D UNDER THE SECURITIES ACT

A. *Background*

The SEC adopted Regulation D in final form in March 1982.[26] The purpose of Regulation D was to streamline and coordinate the limited offering and nonpublic exemptions under sections 3(b) and 4(2) of the Securities Act in order to provide a more coherent pattern of exemptive relief (particularly aimed at the capital formation needs of small business) and to achieve uniformity between state and federal exemptions in order to facilitate capital formation consistent with the protection of investors.[27]

As originally adopted, Regulation D consisted of six rules (Rules 501 through 506)[28] prefaced by seven preliminary notes. Rules 501 through 503 set forth definitions, general terms and conditions and the notice requirement applicable to the three operative exemptions contained in Regulation D. Rule 504, which replaced old Rule 240,[29] originally provided an operative exemption for offerings not in excess of $500,000. Rule 505, which replaced old Rule 242,[30] contained an operative exemption for offerings not in excess of $5,000,000. Rule 506, which replaced old Rule 146,[31] contained an operative exemption for offerings without regard to their dollar amount.

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[26] *See* Securities Act Release No. 6389, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,106, at 84,907-24 (Mar. 8, 1982) [hereinafter Adopting Release]. One of the most comprehensive treatments of Regulation D is J. WILLIAM HICKS, LIMITED OFFERING EXEMPTIONS: REGULATION D (rev. ed. 1993). *See generally*, Mark A. Sargent, *The New Regulation D: Deregulation, Federalism and the Dynamics of Regulatory Reform*, 68 WASH. U. L.Q. 225 (1990) (general discussion of Regulation D); Manning Gilbert Warren III, *A Review of Regulation D: The Present Exemption Regimen for Limited Offerings Under the Securities Act of 1933*, 33 AM. U. L. REV. 355 (1984) (same).

[27] *See* Securities Act Release No. 6339, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,014, at 84,453-74 (Aug. 7, 1981) [hereinafter Proposing Release].

[28] 17 C.F.R. §§ 230.501-.506 (1993).

[29] 17 C.F.R. § 230.240 (rescinded 1982). Rule 240, which was adopted by the SEC pursuant to the statutory authority in Securities Act § 3(b), exempted offerings not in excess of $100,000 within a 12-month period. For discussion of Rule 240, see Securities Act Release No. 5560, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,066, at 84,945-51 (Jan. 24, 1975).

Rules 504 and 505 were promulgated by the SEC pursuant to section 3(b) of the Securities Act. Section 3(b) empowers the SEC to enact rules exempting certain offerings up to $5,000,000 "if it finds that [registration] is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character" of such offerings.[32] Unlike Rules 504 and 505, Rule 506 was promul-

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[30] 17 C.F.R. § 230.242 (rescinded 1982). Adopted by the SEC pursuant to its authority in Securities Act § 3(b), Rule 242 exempted offerings not in excess of $2 million within a six-month period, provided that the offering was sold to no more than 35 purchasers. Rule 242 also introduced the "accredited investor" concept that has been adopted by Regulation D. *See infra* notes 116-73 and accompanying text. For discussion of Rule 242, see Securities Act Release No. 6180, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,426, at 82,812-21 (Jan. 17, 1980).

[31] 17 C.F.R. § 230.146 (rescinded 1982). For discussion of Rule 146, see Securities Act Release No. 5487, 1 Fed. Sec. L. Rep. (CCH) ¶ 2710, at 2902-08 (Apr. 23, 1974).

[32] 15 U.S.C. § 77c(b) (1988). In addition to Rules 504 and 505 (and their predecessors), the SEC has also used its authority under § 3(b) to adopt two other significant issuer exemptions from registration under the Securities Act. These include the Rule 701 exemption for compensatory transactions and contracts and the Regulation A small offering exemption. The Rule 701 exemption is the subject of Section III(B) of this article in *Financing a Small Business (Part II)*. The Regulation A exemption permits a nonpublic issuer (one not subject to the reporting requirements of the Exchange Act) to make a small public offering by following a procedure that is like a miniature registration. The issuer is required to prepare and file with the SEC an offering statement containing prescribed financial and narrative disclosure comparable to that in a Securities Act registration statement (one major difference being that financial statements of a nonpublic issuer need not be audited under Regulation A). Exempt sales may not be made until the SEC has cleared the offering statement and a related offering circular has been delivered.

The SEC overhauled and expanded the Regulation A exemption in 1992 as part of its so-called Small Business Initiatives. *See* 1992 Small Business Initiatives Amendment Release, *supra* note 18. Prior to the 1992 revisions, Regulation A had become severely limited in its usefulness. Issuers were permitted to offer only $1,500,000 in securities under the exemption every 12 months. This low ceiling, combined with the relatively high cost of the mandatory disclosure and procedure, made the exemption an extremely inefficient means of financing. The revisions expanded the exemption to permit offerings of up to $5 million every 12 months by an issuer. The revised Regulation A exemption is set forth in Rules 251 to 263 under the Securities Act. 17 C.F.R. 230.251-.263 (1993). *See generally* Subcommittee on Annual Review of gated by the SEC pursuant to section 4(2) of the Securities Act, the so-called "private placement" exemption, which exempts "transactions by an issuer not involving any public offering."[33] Accordingly, Rule 506 is designed as a safe harbor under section 4(2).[34] Since section 3(b) is not itself an exemption from registration, but rather an empowering provision, Rules 504 and 505 are not safe harbors.[35]

Since its adoption in 1982, Regulation D has been the subject of a substantial amount of interpretive advice by the SEC, including an extensive question-and-answer format interpretive release in 1983,[36] and hundreds of interpretive letters.[37]

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the Business Law Section, American Bar Association, *Significant 1992 Regulatory Developments*, 48 BUS. LAW. 977, 995-97 (1993) [hereinafter 1992 Regulatory Developments].

The Regulation A exemption is not ordinarily used for start-up or early stage financing and is therefore not treated in detail in this article.

[33] 15 U.S.C. § 77d(2) (1988). The § 4(2) private placement exemption is the subject of Section III(A) of this article in *Financing a Small Business (Part II)*.

[34] *See infra* notes 54-55 and accompanying text.

[35] *See infra* notes 54-55 and accompanying text.

[36] Securities Act Release No. 6455, 1 Fed. Sec. L. Rep. (CCH) ¶ 2380, at 2637-1 to -18 (Mar. 3, 1983) [hereinafter Q & A Release].

[37] In addition to the formal releases and orders through which the SEC communicates, it has developed and encouraged the use of informal processes for communicating to the public (particularly securities law practitioners) SEC staff interpretations of the federal securities laws. The most important of these informal procedures is the "no-action" letter process. *See* Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 BUS. LAW. 1019 (1987). In this process, the SEC staff responds to request letters asking for the staff's enforcement attitude toward either a proposed transaction described in the request letter or an interpretation of a statute or rule in the context of a proposed transaction. Technically, the first type of response is known as a "no-action" response, and the second type is known as an "interpretive" letter. *Id.* at 1022. The SEC's elucidation of the process is set forth in *Procedures Available to Requests for No-Action*, Securities Act Release No. 6269 (Dec. 5, 1980), *reprinted in* SEC DOCKET 839 (Dec. 23, 1980); *Procedures for Rendering Informal Advice*, Securities Act Release No. 6253, 1 Fed. Sec. L. Rep. (CCH) ¶ 373, at 1253-56 (Oct. 28, 1980); *Procedures for No-Action Letters*, Securities Act Release No. 5127, 1 Fed. Sec. L. Rep. (CCH) ¶ 66,481.10, at 59,291 (Jan. 25, 1971).

Although, as a technical matter, no-action and interpretive letters may have limited precedential value to persons other than the addressee, they are, as a practical matter, an extremely important resource for advising clients who propose comparable transactions. *See* Lemke, *supra*, at 1019-20, 1042-44; Richard H. Rowe, *A SEC Staff "No-Action" Position: An Impervious Shield Against Liability or a Paper Tiger?*, INSIGHTS, July 1992, at 21. The CCH *Federal Securities Law Reporter* publishes

Although Regulation D has generally been regarded as one of the SEC's success stories, a number of inconsistencies and persistent problems became apparent in its first five years of application.[38] In March 1988, the SEC addressed a number of such problems in what were at the time the most significant amendments to Regulation D since its adoption.[39] The 1988 amendments made important changes to the key definition of "accredited investor,"[40] increased the amount of securities which may be sold under Rule 504 from $500,000 to $1,000,000 in certain cases,[41] modified the information delivery requirements for Rule 505 and Rule 506 offerings[42] and effected a number of other technical modifications.

In March 1989, the SEC added Rules 507 and 508 to Regulation D as part of additional amendments aimed primarily at lessening the risk that its exemptions become unavailable to issuers as a result of insignificant, technical failures to comply.[43] The 1989 amendments also added certain government employee plans to the definition of "accredited investor,"[44] modified certain information delivery requirements[45] and effected a number of other technical modifications.

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selected no-action and interpretive letters. No-action and interpretive letters are also available on LEXIS and WESTLAW. An extremely helpful analysis of interpretive letters relating to issuer exemptions from registration is found in ROBERT J. HAFT, ANALYSIS OF KEY SEC NO-ACTION LETTERS, chs. 3 & 6 (rev. ed. 1992-1993). *See also* Alan B. Levinson, *Analysis of Key SEC No-Action Letters by Robert J. Haft*, 48 BUS. LAW. 387 (1992) (book review).

For discussion of interpretive opinions and "no-action" letters issued by the Mississippi Secretary of State, see *infra* notes 577-78 and accompanying text in *Financing a Small Business (Part II).*

[38] *See* Sargent, *supra* note 26, at 227, 236-42.

[39] *See* Securities Act Release No. 6758, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,221, at 89,012-16 (Mar. 3, 1988) [hereinafter 1988 Amendment Release].

[40] *See infra* notes 116-73 and accompanying text.

[41] *See infra* notes 82-90 and accompanying text.

[42] *See infra* notes 240-42 and accompanying text.

[43] *See* Securities Act Release No. 6825, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,404, at 80,045-50 (Mar. 14, 1989) [hereinafter 1989 Amendment Release].

[44] *See infra* note 144 and accompanying text.

[45] *See infra* notes 203-04 and accompanying text.

In July 1992, the SEC again revised Regulation D, this time as part of a broader regulatory reform aimed at helping small businesses raise capital and reduce the costs of compliance with federal securities laws.[46] The Small Business Initiatives increased the annual aggregate offering price for Rule 504 to $1,000,000 in all cases,[47] eliminated the prohibition on general solicitation and advertising for Rule 504 offerings and made securities sold in reliance on the Rule 504 exemption freely tradeable (*i.e.*, not "restricted securities" within the meaning of Rule 144 under the Securities Act),[48] all without regard to whether the offering is registered or exempt under state law. As revised, Rule 504 provides nonpublic issuers with an exemption from Securities Act registration for public offerings of freely tradeable securities aggregating up to $1,000,000 every twelve months with no restrictive conditions and no mandatory disclosure (except as necessary to avoid antifraud liability).[49]

In April 1993, the SEC adopted an additional round of Small Business Initiatives.[50] These made minor revisions to the information disclosure requirements for Rule 505 and Rule 506 offerings to parallel the new integrated registration and reporting system for small business issuers which the SEC had put into place in 1992.[51]

B. *Preliminary Notes*

The Preliminary Notes to Regulation D cover certain fundamental principles upon which the exemptions are based. Preliminary Note 1 reminds the issuer that Regulation D offerings, although exempt from the registration and prospectus delivery requirements of the Securities Act, are not exempt from the antifraud provisions of the federal securities laws.[52] Issuers must always consider whether sufficient disclosure has been made in connection with an offering, even if pursuant to Rule 502 no specific information delivery requirement is prescribed. Preliminary Note 1 also reminds issuers that, even if they comply with prescribed information delivery requirements under Rule 502, they must provide such further information, if any, as may be necessary to make the information required under Regulation D, in light of the circumstances under which it is furnished, not misleading. Preliminary Note 2 restates the issuer's obligation to comply with applicable state securities law.[53]

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[46] *See* 1992 Small Business Initiatives Amendment Release, *supra* note 18.

[47] *See infra* notes 82-89 and accompanying text.

[48] *See infra* notes 92-95 and accompanying text.

[49] Revised Rule 504 is not available to "blank check companies" (development stage companies with no specific business plan or purpose or a business plan to engage in mergers or acquisitions with unidentified companies). *See* Securities Act Release No. 6961, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,047, at 83,339-41 (Oct. 9, 1992) [hereinafter Rule 504(a) Rescinding Release]; *see also infra* notes 74-81 and accompanying text.

[50] *See* 1993 Small Business Initiatives Amendment Release, *supra* note 18.

[51] *See infra* notes 209-37 and accompanying text.

Preliminary Note 3 makes clear that attempted compliance with any rule in Regulation D does not act as an exclusive election. An issuer may always claim the availability of any other applicable exemption. In this respect, it is important to note once again that Rules 504 and 505 were enacted pursuant to section 3(b). Outside the strict contours of Rules 504 and 505 there is no comparable statutory exemption. Precise compliance with Rule 504 or Rule 505 is necessary in order for a limited offering exemption to be available. On the other hand, Rule 506 serves as a safe harbor within the section 4(2) statutory exemption. Failure to comply with the safe harbor guidelines of Rule 506 does not necessarily result in loss of an exemption under section 4(2).[54] As Preliminary Note 3 points out, intent to comply with Rule 506, or for that matter Rules 504 and 505, will not in itself affect the availability of the private placement exemption under section 4(2). Even though a purported Rule 505 offering may fail to comply with all the requirements of Regulation D and thus fail to be exempt under Rule 505, such offering may nevertheless be exempt under some other provision under the Securities Act, such as section 4(2) or section 3(a)(11) (the so-called "intrastate offering" exemption), assuming the offering meets the conditions of such other exemptions.[55]

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[52] The principal antifraud provisions of the federal securities laws include §§ 17 and 12(2) of the Securities Act, 15 U.S.C. §§ 77q, 77l(2) (1988); § 10(b) and Rule 10b-5 under the Exchange Act, 15 U.S.C. § 78j (1988) and 17 C.F.R. § 240.10b-5 (1992). The essence of these various provisions was summarized succinctly in a recent article written in the form of a letter to a client preparing for an exempt offering:

> These antifraud provisions collectively prohibit any person in connection with the purchase or sale of any security from misrepresenting or omitting a material fact or engaging in any act or practice that constitutes a "fraud" or deceit upon any other person. Fraud, for securities law purposes, is much broader than you would believe. It includes omissions in disclosure (sometimes even unintentional ones) rather than just deliberate misrepresentations. Therefore, regardless of whether you intend to defraud an investor, should you fail to disclose a material fact, you will be liable.

Morgenstern, *supra*, note 25, at 270.

As in the case of violations of § 5 of the Securities Act, violations of the antifraud provisions of the federal securities laws may result in civil liability, injunction, civil penalties, suspension or revocation of broker-dealer registrations as well as criminal liability. *See supra* notes 4-9 and accompanying text. Such liability may apply to corporate officers, directors, principal shareholders, promoters and others associated with the offering under the "control person" and other secondary liability provisions of the Securities Act and the Exchange Act. *See* 9 LOSS & SELIGMAN, *supra* note 1, at 4466-90. The topic of antifraud liability under the federal securities laws is beyond the scope of this article. For general treatment of this massive topic, see JENNINGS, ET AL., *supra* note 1, at chs. 13-19; 9 LOSS & SELIGMAN, *supra* note 1, at ch. 11.

[53] *See supra* notes 2 & 10.

Preliminary Note 4 makes clear that Regulation D exemptions are available only to issuers and not to affiliates or others for resales of securities.[56] Preliminary Note 4 also makes clear that the Regulation D exemptions relate only to the transactions in which the securities are offered or sold by the issuer, not to the securities themselves. Subsequent resale requires either registration or a new exemption for such transaction.

Generally, for resale of securities, purchasers will rely on the exemption from registration afforded by section 4(1) of the Securities Act for transactions by "any person other than an issuer, underwriter or dealer."[57] Securities sold pursuant to the Rule 505 or 506 exemptions of Regulation D are "restricted securities" as defined in Rule 144 under the Securities Act.[58]

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[54] *See* Weprin v. Peterson, 736 F. Supp. 1124, 1130-31 (N.D. Ga. 1988); 3 LOSS & SELIGMAN, *supra* note 1, at 1406-07; Sargent, *supra* note 19, at 230 n.18.

[55] *See* Q & A Release, *supra* note 36, Question 74, at 2637-15.

[56] *See also* Q & A Release, *supra* note 36, Question 76, at 2637-15.

[57] 15 U.S.C. § 77d(1) (1988).

[58] 17 C.F.R. § 230.144 (1993).

As a practical matter, restricted securities may only be resold into the public market under section 4(1) by complying with the Rule 144 current public information, volume, manner of sale, notice and holding period requirements. Under certain circumstances, restricted securities may also be sold to "qualified institutional buyers" pursuant to Rule 144A under the Securities Act or in private transactions outside the confines of Rule 144 and Rule 144A.[59]

Preliminary Note 5 confirms the availability of Regulation D exemptions for sales of securities relating to certain business combinations, such as reclassifications, mergers, consolidations or asset sales.[60]

Preliminary Note 6 reminds issuers that Regulation D is not available to any issuer for any transaction or chain of transactions that, although in technical compliance with the rules, is part of a plan or scheme to evade the registration provisions of the Securities Act.[61] Preliminary Note 7 reminds issuers that offers and sales made outside the United States do not require registration under the Securities Act if carried out in compliance with Regulation S. Persons who are offered and sold securities in such transactions are not counted in the number of purchasers for purposes of Regulation D nor are the proceeds from such transactions included in the aggregate offering price under Regulation D.

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[59] For further discussion of the restrictions on resale of securities sold in Regulation D transactions and of Rules 144A and 144, see *infra* text and accompanying notes 337-62.

[60] Rule 145(a) under the Securities Act, 17 C.F.R. § 230.145(a) (1993), clarifies that issuance of securities in connection with corporate reclassifications, mergers or consolidations or asset acquisitions followed by corporate dissolution constitutes a "sale" of such securities within the meaning of § 2(3) of the Securities Act, and therefore must be registered or exempt from registration. Prior to adoption of Rule 145 in 1972, the SEC had taken the position that issuance of securities in connection with such transactions did not involve a "sale" for purposes of the Securities Act because such issuance was pursuant to a vote of shareholders rather than individual, volitional investment decisions. *See* Securities Act Release No. 5316, [1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,015, at 82,196-204 (Oct. 6, 1972); *Division of Corporation Finance's Interpretations of Rule 145 and Related Matters*, Securities Act Release No. 5463, 1 Fed. Sec. L. Rep. (CCH) ¶ 3058, at 3067-3 to -9 (Feb. 28, 1974).

For discussion of the broad definition of "sale" in § 2(3) of the Securities Act, see 2 LOSS & SELIGMAN, *supra* note 1, at 1083-08. For discussion of interpretive opinions and "no-action" letters issued by the Mississippi Secretary of State on the scope of the "sale" definition under the Mississippi Securities Act, see Parsons, *supra* note 2, at 185-86.

[61] Note that *avoidance* of the registration provisions is not the same thing as *evasion*.

Regulation S consists of a series of four rules (Rules 901 through Rule 904)[62] adopted under the Securities Act in April 1990 that codify the SEC's position with regard to the application of the registration provisions of section 5 to offers and sales of securities outside the United States.[63] Regulation S generally provides that offers and sales of securities made outside the United States are not subject to section 5 and provides two safe harbors for specific transactions. Regulation S supplants prior SEC interpretive advice on the subject.[64] It is intended to assist U. S. and foreign issuers, through clarification of SEC policy, to offer and sell securities which are beyond the reach of the Securities Act and therefore not subject to registration.[65] While Regulation S is relevant to the offer and sale of unregistered securities, it does not involve a securities exemption, and further discussion is beyond the scope of this article.

C. Rule 504

1. Availability

Rule 504 is available to all types of issuers except issuers that are subject to the reporting obligations of sections 13 or

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[62] 17 C.F.R. §§ 230.901-.904 (1993).

[63] *See* Securities Act Release No. 6863, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,524, at 80,685-96 (Apr. 24, 1990).

[64] The interpretive advice was contained primarily in Securities Act Release No. 4708, 1 Fed. Sec. L. Rep. (CCH) ¶¶ 1361-1363, at 2123-24 (July 9, 1964). *See* Q & A Release, *supra* note 36, Question 56, at 2637-12.

[65] *See generally* HAROLD S. BLOOMENTHAL, ET AL., SECURITIES LAW HANDBOOK 31-28 to 31-73 (1993 ed.) (discussing application of Regulation S); Lynn Bai, *U. S. Registration Requirement for Multi-National Offerings—I*, 25 REV. SEC. & COMMODITIES REG. 131 (1992) (same); Lynn Bai, *U. S. Registration Requirements for Multi-National Offerings—II*, 25 REV. SEC. & COMMODITIES REG. 151 (1992) (same); Andrea F. Bradley, *Regulation S: Tempest in a Safe Harbor*, 25 REV. SEC. & COMMODITIES REG. 185 (1992) (same).

15(d) of the Securities Exchange Act of 1934,[66] or issuers that are "investment companies" and "blank check companies."[67]

a. De Minimis Exemption

The limitation with respect to Exchange Act reporting companies is consistent with the purpose of Rule 504 as a *de minimis* exemption designed for small, emerging businesses. It was deemed inappropriate for more mature entities with a history of Exchange Act reporting to have such an exemption available.[68] The burden involved in compliance with the Regulation D information delivery requirements (which apply to offerings to any nonaccredited investor under Rule 505 or Rule 506) will generally be less for an Exchange Act reporting company than for a company that does not file reports under the Exchange Act.[69] The need for the *de minimis* exemption of Rule 504 to avoid the prohibitive costs of a small offering is therefore less for a reporting company.

b. Investment Company Definition

"Investment company" as used in Regulation D means an "investment company" as defined in section 3 of the Investment

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[66] 15 U.S.C. §§ 78m & 78o(d) (1988). Section 13 of the Exchange Act imposes the obligation on all issuers with securities registered under § 12 of the Exchange Act to file certain periodic and other reports with the SEC (*e.g.*, Annual Report on Form 10-K, Quarterly Report on Form 10-Q, Current Report on Form 8-K). Registration under § 12 is required of all securities listed on a national exchange. 15 U.S.C. § 78(l)(a) (1988). Likewise, § 12 registration is required of all equity securities traded in the over-the-counter market if the issuer has more than $5 million in assets and 500 or more shareholders. *Id.* § 78(l)(g) & 17 C.F.R. § 240.12g-1 (1993).

Section 15(d) of the Exchange Act imposes the obligation to file periodic reports on all issuers that have had a Securities Act registration go effective.

[67] The term "issuer" is broadly defined under § 2(4) of the Securities Act. 15 U.S.C. § 77b(4) (1988). It may include a person who organizes an entity and is primarily responsible for the entity's success. *See* SEC v. Murphy, 626 F.2d 633, 642 (9th Cir. 1980). However, a reporting company which merely owns a controlling interest in a partnership will not be considered the issuer of the partnership's interests for purposes of determining Rule 504 availability where it did not organize or sponsor the partnership. *See* United Cellular Corp., SEC No-Action Letter, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,507, at 77,562 (June 22, 1990).

[68] *See* Proposing Release, *supra* note 27, at 84,467.

[69] *See infra* notes 252-56 and accompanying text.

Company Act.[70] The Investment Company Act definition is broad, including any issuer which "is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting or trading in securities."[71] The definition thus includes entities commonly thought of as investment companies, such as mutual funds. Without an express exclusion, however, it would also include entities such as venture capital partnerships and investment clubs.

In order to avoid regulation under the Investment Company Act, nonpublic venture capital partnerships and investment clubs rely on section 3(c)(1) of the Investment Company Act. Section 3(c)(1) excludes an entity from the definition of "investment company" if its securities are beneficially owned by not more than 100 persons and it sells its securities in transactions not involving a "public offering."[72] Compliance with Rule 506, the safe harbor under section 4(2) of the Securities Act, will assure that no public offering has taken place for purposes of the section 3(c)(1) exclusion. Compliance with Rules 504 or 505, however, does not. Rules 504 and 505 do not on their face purport to cover transactions not involving any public offering; instead they exempt under section 3(b) of the Securities Act on the basis that enforcement of the Securities Act is not necessary in the public interest due to the limited (but not necessarily nonpublic) character of such offerings. Consequently, any issuer relying upon, or intending to rely upon, the section 3(c)(1) exemption to avoid regulation under the Investment Company Act, should offer its securities pursuant to Rule 506 or the section 4(2) exemption.[73]

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[70] *See* Q & A Release, *supra* note 36, at 2637-13 n.45.

[71] 15 U.S.C. § 80a-3(a)(1) (1988).

[72] *Id.* § 80a-3(c)(1).

[73] *See* San Jose Capital Corp., SEC No-Action Letter, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,391, at 78,438 (Jan. 13, 1983); *see also* J.Y. Barry Arbitrage Management Inc., 1989 SEC No-Act. LEXIS 1074, at *1-2 (Oct. 18, 1989); Shaw, Pittman, Potts & Trowbridge, SEC No-Action Letter, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,844, at 78,276-78 (Mar. 15, 1988).

c. Blank Check Company Definition

A "blank check company" is defined in section 7(b)(3) of the Securities Act as "any development stage company that [either] has no specific business plan or purpose [or] has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies."[74] In the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Congress found that blank check offerings cause harm to investors and directed the SEC to formulate special rules governing registered blank check public offerings.[75] The SEC adopted such rules in 1992.[76] New Rule 419 under the Securities Act requires funds received and securities issued in a penny stock offering by a blank check company to be placed in an escrow or trust account until acquisition of a business or businesses having a fair market value equal to at least 80% of the offering proceeds.[77] New Rule 15g-8 under the Exchange Act prohibits trading of the securities held in the new Rule 419 account.[78]

In view of the heavy restrictions imposed on registered offerings by blank check companies, the Small Business Initiatives excluded such issuers from expanded Rule 504 (which, in effect, permits an unregistered public offering).[79]

"Blank check company" does not include direct participation programs (sometimes called "blind pools") where a detailed plan of business is developed, even though specific investment properties are unidentified (*e.g.*, a real estate limited partnership formed to invest in apartment buildings that have not yet been selected).[80] The term also does not include start-up issuers with specific business plans but which have not yet commenced operations at the time of the offering.[81]

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[74] 15 U.S.C. § 77g(b)(3) (Supp. III 1991).

[75] *See* H.R. Rep. No. 101-617; 101 Cong., 2d Sess. 10-11, 15 (1990).

[76] *See* Securities Act Release No. 6932, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,937, at 82,596-97 (Apr. 13, 1992).

[77] 17 C.F.R. § 230.419 (1993). "Penny stock" is defined in Exchange Act Rule 3a51-1 as any equity security that is not either: (1) exchange-traded or NASDAQ-quoted, (2) issued by an investment company registered under the Investment Company Act, (3) a put or call option issued by the Options Clearing Corporation, (4) priced at $5 or more, or (5) issued by a business meeting certain tangible asset or revenue levels. 17 C.F.R. § 240.3a51-1 (1993).

[78] *Id.* § 240.15g-8. *See generally* 1992 Regulatory Developments, *supra* note 32, at 1008-11.

[79] *See* Rule 504a Rescinding Release, *supra* note 49, at 83,339 (reasoning that blank check companies had been found to be "common vehicle for fraud and manipulation").

2. *Maximum Aggregate Offering Price*

The maximum aggregate offering price under Rule 504 is $1,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the Rule 504 offering in reliance on any exemptions under section 3(b) of the Securities Act or in violation of section 5(a) of the Securities Act.[82] As originally adopted, the maximum aggregate offering price had been $500,000, less such amounts. The 1988 amendments increased the $500,000 limit to $1,000,000, provided that no more than $500,000 was offered or sold without registration under state securities laws. The 1992 Small Business Initiatives made $1,000,000 the limit regardless of state securities law registration.[83]

The exempt transactions under section 3(b) that will most often reduce the maximum aggregate offering price of Rule 504 include other Rule 504 offerings, Rule 505 offerings and Regulation A offerings.[84] Unless combined with the maximum aggregate offering price by virtue of the integration concept,[85] the aggregate offering price of sales pursuant to sections 4(2),

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[80] *See* Securities Act Release No. 6932, *supra* note 76, at 82,597.

[81] *See* Securities Act Release No. 6932, *supra* note 76, at 82,597.

[82] "Aggregate offering price" is defined in Rule 501(c) as "the sum of all cash, services, property, notes, cancellation of debt, or other consideration to be received by an issuer for issuance of its securities." 17 C.F.R. § 230.501(c) (1993).

[83] *See supra* notes 46-51 and accompanying text.

[84] *See supra* note 32. The other major exemption adopted pursuant to § 3(b) authority, Rule 701, does not aggregate with any other exemption under its explicit terms. *See infra* notes 514-19 and accompanying text in *Financing a Small Business (Part II)*.

[85] *See infra* text accompanying notes 298-99.

4(6) or 3(a)(11) will not be counted against the maximum aggregate offering price under Rule 504.[86]

The aggregation concept applies to the aggregate offering price of section 3(b) offerings during the previous twelve-month period regardless of the type of security previously offered. For example, an issuer that had sold an aggregate of $600,000 in debt securities pursuant to Rule 504 would only be able to sell $400,000 in aggregate offering price of common stock in a subsequent Rule 504 offering during the same twelve-month period.[87]

Exceeding the limitation on maximum aggregate offering price in a subsequent offering does not affect the availability of Rule 504 for earlier transactions carried out in compliance with the rule.[88] For example, an issuer may sell $950,000 in aggregate offering price of debt securities in June pursuant to Rule 504, and then in October sell $100,000 in aggregate offering price of common stock in attempted reliance on Rule 504. The subsequent sale would not affect the availability of the Rule 504 exemption for the debt offering (assuming the two offerings are not integrated), but the Rule 504 exemption would not be available for any of the sales of common stock. Since Rule 504 exempts "offerings" and not individual sales of securities, Rule 504 would not be available for *any* of the common stock sold in October. The issuer could have relied on Rule 504 to sell a maximum of $50,000 in aggregate offering price in October, but once it sold more than $50,000, the exemption would be lost with respect to the entire common stock offering.[89]

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[86] *See* Q & A Release, *supra* note 36, Questions 68 & 70, at 2637-14, -15. Sales pursuant to a previous registered offering would also not be aggregated with a subsequent Rule 504 offering. However, an issuer having recently completed a registered offering generally will be an Exchange Act reporting company by virtue of § 15(d) of the Exchange Act, and Rule 504 will therefore not be available at all. *See supra* note 66.

[87] *See* Q & A Release, *supra* note 36, Question 67, at 2637-14.

[88] *See* 17 C.F.R. § 230.504 n.2 (1993).

[89] The Regulation D exemptions (as well as the other exemptions treated in this article) are transactional. That is, they are available on a transaction-by-transaction basis only. The Rule 504, 505 and 506 exemptions are not available to cover only some,

The SEC views rescission offers as relating back to the earlier offering in violation of section 5. Although a rescission offer may take place within twelve months of a Rule 504 offering, such rescission offer does not aggregate with the Rule 504 offering. The underlying transaction in violation of section 5(a) of the Securities Act aggregates only if such transaction occurred within twelve months of the Rule 504 offering.[90]

3. *Maximum Number and Qualification of Offerees or Purchasers*

There are no express limitations on the number of offerees or purchasers in a Rule 504 offering. There are no qualification requirements for offerees or purchasers in a Rule 504 offering.

4. *Information Delivery Requirements, Other Terms and Conditions*

There are no express information delivery requirements in a Rule 504 offering other than as generally dictated by the antifraud provisions of the federal securities laws.[91]

As is the case with Rules 505 and 506, to qualify for the Rule 504 exemption, offers and sales must satisfy the applicable terms and conditions of Rules 501 through 503. Before the 1992 Small Business Initiatives, this meant that the Rule 504 exemption was conditioned on compliance with both the prohibition on general solicitation or advertising in Rule 502(c)[92] and the limitation on resale in Rule 502(d).[93] The

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but not all, of the offers and sales that make up an offering. *See* 3 LOSS & SELIGMAN, *supra* note 1, at 1211. A corollary of this basic axiom of transactionality is that an exemption may be lost for an entire transaction if even one offer or sale comprising part of the offering does not comply. *See* Morgenstern, *supra* note 25, at 264. The Securities Act does not define what constitutes an "offering" for purposes of availability of transactional exemptions, but the SEC has developed the doctrine of integration to determine which offers and sales should be considered part of a single transaction for such purpose. For discussion of the integration doctrine, see *infra* notes 264-73 and accompanying text.

[90] *See* Q & A Release, *supra* note 36, Question 69, at 2637-14 to -15.

[91] *See infra* text accompanying notes 200-04.

[92] *See infra* notes 300-36 and accompanying text.

[93] *See infra* notes 337-62 and accompanying text.

only exception was that such conditions were eliminated in a Rule 504 offering conducted exclusively in states in which (i) the securities were registered and a disclosure document was delivered prior to sale pursuant to the requirements of applicable state law or (ii) no registration provision existed. The 1992 Small Business Initiatives eliminated these two conditions in all cases, giving eligible issuers an exemption for public offerings of freely tradeable securities without regard to whether the offering is registered or exempt under state law. These revisions "reflect a final recognition that the federal regulatory interest in offerings under $1,000,000 is genuinely trivial, and that the states should be relied upon to regulate these offerings by either registration or exemption."[94]

Issuers under Rule 504 are still required to file a Notice of Sale on Form D with the SEC, but timely filing is no longer a condition to availability of the exemption.[95]

D. Rule 505

Rule 505 is available to all types of issuers except issuers that are "investment companies" (as defined in section 3 of the Investment Company Act)[96] and issuers that are subject to certain disqualification provisions (the so-called "bad boy" provisions) contained in Rule 262 of Regulation A.[97] The "bad boy" provisions of Regulation A relate, for the most part, to criminal, administrative and civil actions involving the issuer (or its general partners, officers, directors or other affiliated persons or selling agents) and the offer or sale of securities. Before the 1992 Small Business Initiatives, this cross-reference to Regulation A also made Rule 505 unavailable to Exchange Act reporting issuers if such issuers had not filed all required Exchange Act reports during the twelve months preceding the first sale in the offering. The 1992 Small Business Initiatives limited issuer eligibility for use of Regulation A to *nonreporting* companies and therefore dropped failure to file reports as a disqualifier under Regulation A.[98] By cross-reference, this "bad boy" disqualifier was also dropped from Rule 505, although Rule 505 continues to be available to Exchange Act reporting companies.

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[94] Sargent, *supra* note 19, at 7.

[95] *See infra* notes 363-69 and accompanying text.

[96] *See supra* notes 70-73 and accompanying text.

[97] 17 C.F.R. § 230.262 (1993); *see* 1992 Small Business Initiatives Amendment Release, *supra* note 18. For a brief description of Regulation A, see *supra* note 32.

The SEC may waive disqualification provisions upon a showing of good cause that it is not necessary under the circumstances that the exemption be denied.[99]

Under Rule 505, the maximum aggregate offering price is $5,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the Rule 505 offering in reliance on any exemption under section 3(b) of the Securities Act or in violation of section 5(a) of the Securities Act. The aggregation concept under Rule 505 is the same as that under Rule 504.[100]

There is no express limitation on the number of offerees in a Rule 505 offering. The number of purchasers in any offering in reliance on Rule 505, however, may not exceed thirty-five. As discussed further below,[101] persons qualifying as "accredited investors" are not included in the calculation of the number of purchasers. Offers and sales to such accredited investors are in all other respects subject to the terms and conditions of Rule 505, except for the information delivery requirements.[102] For example, sales to accredited investors are included in calculating the aggregate offering price, and offers and sales to accredited investors must be made in compliance with the applicable manner of offering requirements.

Rule 505 requires only that the issuer "reasonably believe" that there are no more than thirty-five purchasers. Accordingly, if an issuer exercises reasonable care in determining the number of purchasers, but in reality the number exceeds thirty-five (because, for example, a purported accredited investor turns out not to be an accredited investor) the exemption will not necessarily be lost. The 1989 amendments also codified previous SEC staff interpretations that the requirement that there be no more than thirty-five purchasers is satisfied, whether or not the issuer had a reasonable belief as to the number of nonaccredited investors, if *in fact* there are not more than thirty-five purchasers.[103]

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[98] *See* Small Business Initiatives Proposing Release, *supra* note 15, at 82,486 n.70.

[99] *See, e.g.*, Salomon Inc., 1992 SEC No-Act. LEXIS 667, at *1-2 (May 20, 1992) (granting waiver for purposes of Rule 505 to Salomon for "bad boy" disqualifications relating to its highly publicized improprieties in U.S. treasury securities auctions).

[100] *See supra* notes 82-89 and accompanying text.

[101] *See infra* notes 179-80 and accompanying text.

[102] *See infra* notes 181-83 and accompanying text.

As is the case with Rule 504, there are no express qualification requirements for offerees or purchasers in a Rule 505 offering.[104]

Rule 505 requires that, as a condition to availability of the exemption, specific information be delivered to any purchaser who is not an accredited investor.[105] To qualify for the Rule 505 exemption, offers and sales must satisfy the applicable terms and conditions of Rules 501 through 503, including both the prohibition and general solicitation and advertising in Rule 502(c) and the limitation on resale in Rule 502 (d).[106] Issuers are still required to file a notice of sale on Form D with the SEC, but timely filing is no longer a condition to availability of the exemption.

E. Rule 506

Rule 506 is available to all types of issuers. There is no limitation on the aggregate offering price of securities offered and sold pursuant to Rule 506. There is no express limitation on the number of offerees in a Rule 506 offering. The number of nonaccredited purchasers in any offering in reliance on Rule 506 may not exceed thirty-five. There is no express limitation on the number of purchasers who are accredited investors.[107]

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[103] *See infra* notes 179-83 and accompanying text.

[104] *But see* discussion of prohibition on general solicitation and advertising *infra* notes 300-36 and accompanying text.

[105] *See infra* notes 200-04 and accompanying text.

[106] *See infra* notes 116-380 and accompanying text.

[107] *See supra* notes 102-104 and accompanying text; *see also infra* notes 137-73 and accompanying text.

Unlike old Rule 146, which Rule 506 replaced, there are no qualification requirements for offerees in a Rule 506 offering.[108] Each purchaser who is not an accredited investor, however, must have (or the issuer must reasonably believe such purchaser to have), either alone or with his purchaser representative,[109] such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment.

Unlike old Rule 146, there is no requirement in Rule 506 that a purchaser be able to bear the economic risk of investment.[110] In adopting Rule 506, the SEC reasoned that the sophistication test should provide adequate investor protection, since a sophisticated investor should be able to assess his capacity to bear economic risk.[111]

For purposes of Rule 506, accredited investors are presumed to meet the sophistication test, and the issuer is under no obligation to qualify accredited investors as sophisticated. Sophistication of accredited investors may, however, be relevant to an issuer seeking to rely on section 4(2) as a backup exemption in the event of failure to comply with all the terms and conditions of Rule 506.

Although Rule 506 has eliminated the need to qualify offerees (as required under old Rule 146), the nature of the offerees to whom a Regulation D offering is directed will still be relevant in determining whether general solicitation and general advertising have occurred.[112]

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[108] *See* Adopting Release, *supra* note 26, at 84,919; 3 LOSS & SELIGMAN, *supra* note 1, at 1395, 1413-14.

[109] *See infra* notes 192-98 and accompanying text.

[110] *See* Adopting Release, *supra* note 26, at 84,919; 3 LOSS & SELIGMAN, *supra* note 1, at 1395, 1413-14.

[111] *See* Proposing Release, *supra* note 27, at 84,468-469.

[112] *See infra* notes 300-36 and accompanying text. In addition to the purchaser qualification requirements of Rule 506, broker-dealers involved in Regulation D offerings will be subject to customer suitability rules which will necessitate an investigation into investor qualifications. *See, e.g.*, Article III, § 2, *NASD Rules of Fair Practice*, NASD Manual (CCH) ¶ 2152, at 2041-46; Rule 405, NYSE Manual (CCH) ¶ 2405 at 3696-98.

Like Rule 505, specific information must be delivered to any purchaser who is not an accredited investor.[113] Unlike section 4(2), mere "access" to the type of information required to be in a registration statement *will not* be an adequate substitute for provision of the required disclosures under Rule 506.[114]

To qualify for the Rule 506 exemption, offers and sales must satisfy the applicable terms and conditions of Rules 501 through 503, including both the prohibition and general solicitation and advertising in Rule 502(c) and the limitation on resale in Rule 502 (d).[115] Issuers are still required to file a notice of sale on Form D with the SEC, but timely filing is no longer a condition to availability of the exemption.

F. Elements of a Regulation D Offering

1. Key Definitions

Rule 501 sets forth eight definitions which are applicable to one or more of the operative exemptions contained in Regulation D. Of these eight, the definitions of "affiliate", "business combination", "executive officer" and "issuer" have presented relatively few interpretive problems unique to Regulation D. The other four definitions ("accredited investor," "calculation of number of purchasers," "aggregate offering price" and "purchaser representative") represent newer concepts which are key to an understanding of Regulation D.

a. Accredited Investor

The accredited investor definition has significance under Regulation D in three respects: (a) the information delivery requirements under Rules 505 and 506 depend on whether a particular purchaser is an accredited investor,[116] (b) calculation of the number of purchasers under Rules 505 and 506[117] and (c) determination of the sophistication of purchasers for purposes of Rule 506.[118] The accredited investor concept has no relevance to Rule 504.

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[113] *See infra* notes 116-83 and accompanying text.

[114] *See infra* notes 404-10 and accompanying text in *Financing a Small Business (Part II)*.

[115] *See infra* notes 116-380 and accompanying text.

[116] *See* Q & A Release, *supra* note 36, at 2637-2 (explanatory material preceding Question 1); *see also infra* notes 200-04 and accompanying text.

In order for a purchaser to have accredited investor status, the issuer or its agents *must have reasonable grounds to believe* and *must believe* that at the time of sale the purchaser falls into at least one of the eight categories set forth in Rule 501(a). Alternatively, purchasers will also be deemed accredited if they qualify *in fact* as accredited investors, whether or not the issuer had a reasonable belief that they were so qualified. In the SEC's view, what constitutes "reasonable belief" will depend upon the facts and circumstances of each case.[119] The SEC has indicated that it will not prescribe or endorse any one method for ascertaining whether a purchaser is an accredited investor.[120]

Regulation D, as originally proposed, included a requirement that the issuer undertake a "reasonable inquiry" to sustain a reasonable belief regarding an investor's accredited status.[121] The "reasonable inquiry" language was dropped from Regulation D as adopted.[122] Although elimination of this proposed requirement clearly does not mean that inquiry need never be made, it does appear to indicate that in certain contexts, the facts relating to accreditation may be sufficiently evident to permit a reasonable belief without independent inquiry.

In order to establish a reasonable belief, self-certification by the purchaser in a subscription agreement or purchaser questionnaire will, in almost all cases, be a necessary first step.

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[117] *See* Q & A Release, *supra* note 36, at 2637-2 (explanatory material preceding Question 1); *see also infra* notes 179-80 and accompanying text.

[118] *See* Q & A Release, *supra* note 36, at 2637-2 (explanatory material preceding Question 1); *see also supra* text accompanying notes 108-11.

[119] *See* Q & A Release, *supra* note 36, at 2637-2 (explanatory material preceding Question 1).

[120] *See* Q & A Release, *supra* note 36, at 2637-2 (explanatory material preceding Question 1).

[121] *See* Adopting Release, *supra* note 26 at 84,911.

[122] *See* Adopting Release, *supra* note 26 at 84,911.

Where the issuer has prior familiarity with a purchaser (through personal knowledge of management, general reputation of the investor or investor involvement in prior transactions), self-certification alone may be sufficient to support a reasonable belief. In other cases, further inquiry and additional supporting data may be necessary to establish a reasonable belief.[123] It may be helpful if the disclosure memorandum and subscription agreement alert prospective investors to the possibility that additional personal information may be requested to substantiate the investor's self-certification. Some issuers include in the subscription agreement a simple balance sheet and income statement for completion by individual investors to support net worth or income tests for accredited status (as well as any other financial suitability standards adopted for a particular offering).

A purchaser must have accredited status at the time of the sale in order for such status to be relevant under Regulation D.[124] A director of a corporate issuer, accredited under Rule 501(a)(4), who purchases in an offering and then resigns prior to termination of the offering is nevertheless accredited for purposes of offering.[125] The result would be different, however, if the election and subsequent resignation were part of a scheme to evade the registration provisions of the Securities Act.[126]

In order to determine accredited investor status, it is first necessary to determine who in fact is the "purchaser" for purposes of Regulation D. For example, a national bank acting in a fiduciary capacity as trustee for several trust accounts will be deemed to be the purchaser of securities purchased for such trust accounts. The bank will be accredited as a national bank regardless of the nonaccredited status of the various trusts for which it acts as trustee.[127] On the other hand, clients of an investment adviser or customers of a broker-dealer, are considered to be the "purchasers" under Regulation D, regardless of the amount of discretion given to the investment adviser or broker-dealer to act on their behalf.[128]

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[123] *See* Wright v. National Warranty Co., 953 F.2d 256, 260 (6th Cir. 1992) (holding that plaintiff's actual nonaccredited status did not destroy exemption where issuer had relied on representations as to accredited status in subscription agreement); Marks v. FSC Sec. Corp., 870 F.2d 331, 336-37 (6th Cir. 1989) (holding that issuer failing to produce signed subscription documents at trial (including suitability letter and offeree questionnaire) had not met its burden of proof of "reasonable belief" as to accredited status of investors, but indicating that had such documents been produced, burden of proof of reasonable belief might have been met by such self-certifications alone).

[124] *See* Q & A Release, *supra* note 36, Question 1, at 2637-2.

[125] *See* Q & A Release, *supra* note 36, Question 1, at 2637-2.

[126] *See* 17 C.F.R. §§ 230.501-.508 (1993) (Preliminary note 6); Q & A Release, *supra* note 36, at 2637-2 n.3.

Section 4(6) of the Securities Act[129] provides an exemption from registration for transactions involving offers and sales of securities by an issuer where: (1) the offers and sales are made exclusively to one or more accredited investors; (2) the aggregate offering price does not exceed the amount allowed under section 3(b) of the Securities Act (currently $5,000,000); (3) there is no general solicitation or advertising in connection with the transaction by the issuer or anyone acting on the issuer's behalf; and (4) the issuer files such notice with the SEC as the SEC shall prescribe.

The definition of accredited investor, for purposes of the section 4(6) exemption, is contained in section 2(15) of the Securities Act and Rule 215 thereunder.[130] The definition is identical to that contained in Rule 501(a) of Regulation D. The notice form prescribed by the SEC for section 4(6) offerings is Form D. The Form D filing requirements for section 4(6) are the same as for Regulation D offerings.[131] Securities acquired in section 4(6) transactions have the same restricted status as securities acquired in transactions pursuant to Rules 505 or 506 of Regulation D or the section 4(2) private placement exemption.[132]

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[127] *See* Q & A Release, *supra* note 36, Questions 2 & 29, at 2637-2 & -6; *see also* Nemo Capital Partners L.P., SEC No-Action Letter, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,506, at 77,618-20 (Apr. 11, 1987).

[128] *See* 17 C.F.R. § 230.501(e) (1993).

[129] 15 U.S.C. § 77d(6) (1988).

[130] 15 U.S.C. § 77b(15) (1988); 17 C.F.R. § 230.215 (1993).

[131] *See infra* notes 363-70 and accompanying text.

[132] *See infra* notes 337-62 and accompanying text.

Congress added the section 4(6) exemption to the Securities Act in the Small Business Investment Incentive Act of 1980.[133] Since promulgation of Rule 505 by the SEC pursuant to section 3(b), however, the section 4(6) exemption has appeared largely redundant.[134]

Despite the clear similarities between the section 4(6) exemption and the Rule 505 exemption applied to an accredited-investor-only offering (*e.g.*, same maximum aggregate offering price, same accredited investor definitions and same absence of prescribed information delivery requirements), there are a number of differences. First, section 4(6) does not contain the same language relating to an issuer having a "reasonable belief" that a purchaser is an accredited investor. On its face, therefore, section 4(6) requires that purchasers be accredited in fact. Second, *any* issuer may use section 4(6). Neither investment companies nor issuers disqualified under Regulation A "bad boy" provisions may use Rule 505.[135] Third, section 4(6) contains a $5,000,000 *per offering* limitation. Rule 505 requires aggregation of all offerings under section 3(b) (or in violation of section 5(a)) during the prior twelve months.[136] In addition, section 4(6) is a statutory exemption. It cannot be rescinded without an Act of Congress. SEC rules can always be rescinded or modified by the SEC. The Rule 215 component of the section 4(6) definition of accredited investor, however, would be subject to SEC rescission or modification.

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[133] *See* Small Business Issuers' Simplification Act of 1980, Pub. L. No. 96-477, 94 Stat. 2294 (1980).

[134] *See* Sargent, *supra* note 19, at 8 (characterizing § 4(6) exemption as "lost in space"); *see also* 3 LOSS & SELIGMAN, *supra* note 1, at 1451.

[135] *See supra* notes 97-99 and accompanying text. Of course, an investment company or an issuer with a "bad boy" problem under Rule 505 may still do an all-accredited offering under Rule 506. The requirements would be identical.

[136] For discussion of the aggregation concept, see *supra* notes 82-89 and accompanying text. Of course, an issuer with a § 3(b) aggregation problem may avoid it by doing the all-accredited offering in reliance on Rule 506 instead of Rule 505. This would avoid aggregation just as reliance on § 4(6) would avoid aggregation. An all-accredited offering under § 4(6) or Rule 506 could still *integrate* (as opposed to *aggregate*) with a previous offering in reliance on a § 3(b) exemption and destroy the exemption. For discussion of the relationship between aggregation and integration, see *infra* notes 298-99 and accompanying text.

The following are the eight categories of accredited investors set forth in Rule 501(a):

(1) *Institutional Investors*: The institutional investor category includes: banks,[137] savings and loan associations and similar institutions,[138] whether acting in an individual or fiduciary capacity; brokers and dealers registered under the Exchange Act; insurance companies[139] and investment companies registered under the Investment Company Act; business development companies;[140] small business investment companies licensed by the Small Business Administration;[141] plans established and maintained by states, their political subdivisions or agencies and instrumentalities of states or their political subdivisions for the benefit of their employees, if the plan has total assets in excess of $5,000,000; and employee benefit plans within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA), if investment decisions are made by a bank, savings and loan association, insurance company or registered investment adviser or if the employee benefit plan has total assets in excess of $5,000,000 or if the plan is self-directed with investment decisions made solely by accredited investors.

The 1988 amendments added savings and loan associations and similar institutions and brokers and dealers registered under the Exchange Act to the definition, based on the SEC's finding that there was no reasonable basis for distinguishing such institutional investors from banks, insurance companies and registered investment companies.[142] Self-directed ERISA plans with investment decisions made solely by accredited investors were also added to the definition in the 1988 amendments, codifying a previous SEC staff interpretation.[143] The 1989 amendments further expanded the institutional investor category to include government sponsored employee plans with total assets in excess of $5,000,000. Government employee plans are generally exempt from coverage under ERISA and consequently did not qualify as accredited investors under the prior definition.[144]

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[137] As defined in Securities Act § 3(a)(2), 15 U.S.C. § 77c(1)(2) (1988).

[138] As defined in Securities Act § 3(a)(5)(A), 15 U.S.C. § 77c(a)(5)(A) (1988).

[139] As defined in Securities Act § 2(13), 15 U.S.C. § 77b(13) (1988).

[140] As defined in Investment Company Act § 2(a)(48), 15 U.S.C. § 80a-2(a)(48) (1988).

[141] Under the Small Business Investment Act of 1958, as amended, 15 U.S.C. §§ 661-696 (1988), the Small Business Administration (SBA) licenses and regulates "small business investment companies" (SBICs). SBICs are designed to supply private funds to eligible small businesses in the form of loans, equity investments or lease or surety bond guarantees. *See generally* James D. Miller, *Small Business Investment Companies: Licensing, Tax and Securities Considerations*, 36 BUS. LAW. 1679 (1981).

[142] *See* 1988 Amendment Release, *supra* note 39, at 89,014.

(2) *Private Business Development Companies*: Private business development companies, as defined in section 202(a)(22) of the Investment Advisers Act of 1940,[145] means a closed-end company organized under, and having its principal place of business in, the United States or its possessions and operated for the purpose of making certain types of investments (predominantly in unseasoned investee companies) and "making available significant managerial assistance" to its investee companies.[146] This category includes primarily nonpublic venture capital funds.

(3) *Tax-Exempt Organizations, Corporations, Business Trusts, Partnerships*: Tax-exempt organizations under section 501(c)(3) of the Internal Revenue Code, corporations, business trusts (such as a "Massachusetts business trust") and partner-

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[143] *See* 1988 Amendment Release, *supra* note 39, at 89,014.

[144] *See* 1989 Amendment Release, *supra* note 43, at 80,046.

[145] 15 U.S.C. § 80b-2(a)(22) (1988).

[146] Making available significant managerial assistance is defined in the Investment Company Act to include:

> (A) any arrangement whereby a business development company, through its directors, officers, employees, or general partners, offers to provide, and, if accepted, does so provide, significant guidance and counsel concerning the management, operations, or business objectives and policies of a portfolio company;
>
> (B) the exercise by a business development company of a controlling influence over the management or policies of a portfolio company by the business development company acting individually or as part of a group acting together which controls such portfolio company; or
>
> (C) with respect to a small business investment company licensed by the Small Business Administration . . . the making of loans to a portfolio company.

15 U.S.C. § 80a-2(a)(47) (1988). For analysis of this and other requirements of "private business development company" status under the Investment Advisers Act definition, see HICKS, *supra* note 1, § 7.02[2][c].

ships with total assets in excess of $5,000,000 qualify as accredited investors so long as they were not formed for the specific purpose of acquiring the securities offered.[147] Total assets may be measured inclusive of all assets which the investor may combine on its balance sheet under generally accepted accounting principles (*e.g.*, inclusive of the assets of a consolidated subsidiary).[148] A tax-exempt organization is not required to have received a ruling on its tax-exempt status under section 501(c)(3).[149]

The 1988 amendments added corporations, business trusts and partnerships to this category.[150] This addition cured one of the most notorious inconsistencies in the original accredited investor definition. The original definition did not include a category based solely on financial status for corporations, partnerships and other entities. As a result, such an entity rarely qualified as an accredited investor unless, with respect to a specific investment, it fell into the original accredited category for an investor purchasing at least $150,000 in securities where the investment did not exceed 20% of the investor's net worth. While a natural person with a $1,000,000 net worth was an accredited investor regardless of the amount invested, a very large corporation was generally not accredited unless it was a $150,000 purchaser.[151]

In part as a result of expanding this category to include corporations, business trusts, and partnerships, the SEC completely eliminated the $150,000 purchaser category from the accredited investor definition in the 1988 amendments. The

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[147] 17 C.F.R. § 230.501(a)(3) (1993). For discussion of the requirement that the entity not be formed for the specific purpose of acquiring the securities, see *infra* notes 174-78 and accompanying text.

[148] *See* Q & A Release, *supra* note 36, Question 5, at 2637-3; *see also* RPII Fund, SEC No-Action Letter, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,991, at 78,890-94 (Jan. 4, 1989) (stating that total assets of general partnership may, for purposes of Rule 501(a)(3), include personal assets of general partners under certain circumstances).

[149] *See* Q & A Release, *supra* note 36, Question 4, at 2637-3; *see also* HICKS, *supra* note 1, § 7.02 [2][d][i][A].

[150] *See* 1988 Amendment Release, *supra* note 39, at 89,014-15.

[151] *See* 1988 Amendment Release, *supra* note 39, at 89,014-15.

SEC also noted that the $150,000 purchaser category had permitted the anomaly of a natural person with a net worth of as little as $750,000 being accredited for purposes of an investment of $150,000, while an investment of a lesser amount required a $1,000,000 individual net worth for accredited status. Elimination of the $150,000 purchaser category also reflected SEC concerns that the category did not adequately assure investor sophistication or access to information.[152]

(4) *Directors, Executive Officers or General Partners of the Issuer or of the General Partner of the Issuer*: Rule 501(a)(4) includes certain insiders of the issuer within the "accredited investor" definition.[153] The term "director" is not defined, but presumably conforms to the normal meaning given the term as a matter of corporate law.[154] The Regulation D definition of "executive officer" is the same as that contained in Rule 405 of Regulation C under the Securities Act. The definition of an executive officer includes the "president, any vice president in charge of a principal business unit, division or function" as well as "any other officer who performs a policy making function, or any other person who performs similar policy making functions for the issuer."[155] The functional component of the definition means that not all persons holding corporate titles are necessarily "executive officers" (*e.g.*, outside counsel holding a title as secretary or assistant secretary) and that certain persons whose titles are not technically that of corporate officers may be "executive officers." In addition, for purposes of Regulation D, an officer of a parent corporation may be deemed to be an "executive officer" of a subsidiary and an officer of a subsidiary may be deemed to be an "executive officer" of a parent, if such

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[152] *See* 1988 Amendment Release, *supra* note 39, at 89,015. Addition of corporations, business trusts and partnerships to the Rule 501(a)(3) category also lessened the importance of the Rule 501(a)(2) category for private business development companies and the Rule 501(a)(8) category for entities where all the equity owners are accredited investors.

[153] 17 C.F.R. § 230.501(a)(4) (1993).

[154] *See* HICKS, *supra* note 1, § 7.02[2][e].

[155] 17 C.F.R. § 230.501(f) (1993).

a person performs the requisite policy making functions with respect to the subsidiary or the parent, respectively.[156]

(5) *Natural Persons with Net Worth, or Joint Net Worth with Spouse, in Excess of $1,000,000*: Originally Rule 501(a)(6), but renumbered Rule 501(a)(5) when the SEC eliminated the $150,000 purchaser category in 1988, this accredited investor category is available *only* to natural persons (*i.e.*, human beings) and *not* to corporations, partnerships, trusts or other "persons."[157] "Net worth" is not defined in Regulation D. The SEC has indicated, however, that in calculating net worth for Regulation D purposes, it is not necessary to subtract the investor's home, home furnishings or automobiles, as is sometimes required under state securities law financial suitability tests.[158] The SEC has also indicated that net worth may be calculated for Regulation D purposes by taking assets at their fair market value rather than the at cost value.[159]

(6) *Natural Persons with Annual Income in Excess of $200,000 or Joint Annual Income in Excess of $300,000*: Like Rule 501(a)(5), this category is also available *only* to natural persons and not to corporations, partnerships, trusts or other "persons." In order to be accredited under Rule 501(a)(6), a natural person must have income in excess of $200,000, or joint income with that person's spouse in excess of $300,000,[160] in each of the last two years and must reasonably expect to reach the same income level in the current year.[161]

In the proposed form of Regulation D, the SEC used "adjusted gross income" for federal income tax purposes to determine whether this income test was met.[162] Based on comments, however, the SEC dropped the reference to "adjusted gross income" and now refers only to "income" without prescribing any definition of the term.[163] This change is intended to provide greater flexibility and to avoid the anomaly of sophisticated investors with substantial amounts of tax-exempt income being unable to meet the income test as accredited investors. The SEC has stated, however, that this change should not be construed to mean that measures of income, which would exaggerate the purchaser's ability to sustain economic, loss may be used.[164] For instance, revenues of a sole proprietorship would not give an accurate picture of the income of a self-employed person without deducting operating expenses of the proprietorship.[165] One method for calculating "income" suggested by the SEC is to increase individual adjusted gross income by adding back: (A) any deduction for long-term capital gains under section 1202 of the Internal Revenue Code; (B) any deduction for depletion under section 611 *et seq.* of the Code; (C) any exclusion for interest under section 103 of the Code; and (D) any losses of a partnership allocated to the individual limited partner as reported on Schedule E of Form 1040.[166]

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[156] *Id.*; Q & A Release, *supra* note 36, Question 6, at 2637-3.

[157] 17 C.F.R. § 230.501(a)(5) (1993); *see* Q & A Release, *supra* note 36, Question 20, at 2637-5.

[158] *See* Adopting Release, *supra* note 26, at 84,913.

[159] *See* Q & A Release, *supra* note 36, Question 21, at 2637-5.

[160] The provision for $300,000 joint income was added in the 1988 amendments in recognition of the increasingly common two-income household. Securities Act Release No. 6683, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,054, at 89,402 (Jan. 16, 1987); *see also* HICKS, *supra* note 1, § 7.02[2][g].

[161] "For an investor purchasing securities in June 1982, income in calendar years 1980 and 1981 and reasonably expected income in 1982 would be used in determining accreditation." Adopting Release, *supra* note 26, at 84,914 n.15.

The SEC has taken the position that unrealized capital appreciation generally may not be included in calculating income.[167] The SEC has given no indication regarding under what circumstances unrealized capital appreciation could be included in income for purposes of Rule 501(a)(6).

(7) *Trusts with Total Assets in Excess of $5,000,000*: Under Rule 501(a)(7), trusts with total assets in excess of $5,000,000

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[162] *See* Proposing Release, *supra* note 27, at 84,460.

[163] *See* Adopting Release, *supra* note 26, at 84,913-14.

[164] *See* Adopting Release, *supra* note 26, at 84,914.

[165] *See* Adopting Release, *supra* note 26, at 84,914.

[166] *See* Adopting Release, *supra* note 26, at 84,914. In one interpretive letter, the SEC staff took the position that contributions to a profit-sharing plan or pension plan would be considered as income for purposes of the Rule 501(a)(6) category, notwithstanding the tax-deferred nature of such contributions, "to the extent that a participant's rights to benefits attributable to such contributions are vested." Raymond, James & Assocs., Inc., 1984 SEC No-Act. LEXIS 2875, at *1 (Dec. 19, 1984).

[167] *See* Q & A Release, *supra* note 36, Question 23, at 2637-5.

not formed for the specific purpose of acquiring the securities offered and with investments directed by a sophisticated person (as described in Rule 506) qualify as accredited investors.[168] Prior to the 1988 amendments, trusts without institutional trustees (like corporations, business trusts and partnerships) were rarely accredited investors unless, with respect to a specific investment, they fell into the old $150,000 purchaser category. The 1988 amendments added this new category to cure the inconsistencies resulting from lack of a category based on financial status alone for such entities and to complement the addition of corporations, business trusts and partnerships with assets of $5,000,000 or more to the Rule 501(a)(3) category.[169]

(8) *Entities Owned Solely By Accredited Investors*: This category includes any entity in which *all* of the equity owners are accredited investors. The equity owners of a corporation are, obviously, its shareholders.[170]

The SEC has expressed the view that the equity owners of a limited partnership are the limited partners.[171] Determining the equity owners of a trust presents more difficult problems. Generally, the SEC views the beneficiary of a conventional trust as *not* being the equivalent of an equity owner of the trust.

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[168] 17 C.F.R. § 230.501(a)(7) (1992). For discussion of the requirement that the entity not be formed for the specific purpose of acquiring the securities, see *infra* notes 174-78 and accompanying text. For discussion of the sophisticated purchaser requirement under Rule 506, see *supra* notes 108-11 and accompanying text.

[169] *See* Securities Act Release No. 6683, *supra* note 160, at 88,402.

[170] The type of analysis required under Rule 501(a)(8) is illustrated by Question 24 in the Q & A Release:

> *Question*: All but one of the shareholders of a corporation are accredited investors by virtue of net worth or income. The unaccredited shareholder is a director who bought one share of stock in order to comply with a requirement that all directors be shareholders of the corporation. Is the corporation an accredited investor under Rule 501(a)(8)?
>
> *Answer*: No. Rule 501(a)(8) requires "all of the equity owners" to be accredited investors. The director is an equity owner and is not accredited. Note that the director cannot be accredited under Rule 501(a)(4). That provision extends accreditation to a director of the issuer, not of the investor.

Q & A Release, *supra* note 36, Question 24, at 2637-5.

[171] *See* Q & A Release, *supra* note 36, Question 24, at 2637-5.

Consequently, the accredited investor status of beneficiaries is irrelevant and will not qualify the trust as an accredited investor under Rule 501(a)(8).[172] The SEC has indicated that this result may be different in the case of certain nonconventional trusts in which, as a result of powers retained by the grantor, a separate legal entity would not be deemed to exist. Consequently, where the grantor of a revocable trust is an accredited investor (*e.g.*, by virtue of Rule 501(a)(5)) and the trust may be amended or revoked at any time by the grantor, the trust will be accredited because the grantor will be deemed the equity owner of the trust assets. Similarly, where the purchase of Regulation D securities is made by an Individual Retirement Account (IRA) and the participant is an accredited investor, the IRA would be accredited under Rule 501(a)(8).[173]

b. Calculation of Number of Purchasers

Defining how to count purchasers is relevant to Rules 505 and 506 which restrict the number of "purchasers" in an offering to thirty-five. Like the definition of "accredited investor," however, this definition is irrelevant to Rule 504 which has no restriction on the number of purchasers. Calculation of the number of purchasers involves a two-step analysis. First, Rules 501(e)(2) and (e)(3) must be applied to identify the "purchasers." Second, Rule 501(e)(1) must be applied in order to determine how the "purchasers" are counted.

In offerings made exclusively to individuals, the question of who are the "purchasers" rarely arises. The issue most often arises when entities are involved. Rule 501(e)(2) provides that a corporation, partnership or other entity shall be counted as a single purchaser for purposes of Regulation D. Rule 501(e)(2), however, goes on to provide that if the "entity is organized for the specific purpose of acquiring the securities offered and is not an accredited investor under [Rule 501(a)(8)], then each beneficial owner of equity securities or equity interests in the entity shall count as a separate purchaser for all provisions of Regulation D."[174]

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[172] *See* Q & A Release, *supra* note 36, Question 24, at 2637-5.

[173] *See* Q & A Release, *supra* note 36, Question 24, at 2637-5.

In *Hall, Moneytree Associates*,[175] the SEC advised that "no one factor will determine whether an entity would be regarded as organized for the specific purpose of making an investment." Factors that would be considered in making such a determination include the "existence and nature of prior activities by the entity, the structure of the entity (*i.e.*, whether the entity has centralized management and decision-making), the proposed activities of the entity, the relationship between the entity's investment in the Regulation D offering and the entity's capitalization, and the extent to which all equity owners of the entity participate in all investments by the entity." An entity will generally be viewed as "organized for the specific purpose" where the beneficial owners participate in the investment decision with respect to the security *and* such decision requires an additional contribution of capital.[176]

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[174] 17 C.F.R. § 230.501(e)(2) (1993). This same specific purpose exception is found in the accredited investor categories covering corporations, partnerships and business trusts (Rule 501(a)(3)) and ordinary trusts (Rule 501(a)(7)), but *not* in the category for entities the equity owners of which are all accredited (Rule 501(a)(8)).

[175] 1983 SEC No-Act. LEXIS 2961, at *1 (Nov. 3, 1983).

[176] Question 59 in the Q & A Release illustrates the difficulty involved in a fairly common structure for informal investment partnerships and clubs:

> *Question*: An investor in a Rule 506 offering is an investment partnership that is not accredited under Rule 501(a)(8). Although the partnership was organized two years earlier and has made investments in a number of offerings, not all the partners have participated in each investment. With each proposed investment by the partnership, individual partners have received a copy of the disclosure document and have made a decision whether or not to participate. How do the provisions of Regulation D apply to the partnership as an investor?
>
> *Answer*: The partnership may not be treated as a single purchaser. Rule 501(e)(2) provides that if the partnership is organized for the specific purpose of acquiring the securities offered, then each beneficial owner of equity interests should be counted as a separate purchaser. Because the individual partners elect whether or not to participate in each investment, the partnership is deemed to be reorganized for the specific purpose of acquiring the securities in each investment. Thus, the issuer must look through the partnership to the partners participating in the investment. The issuer must satisfy the conditions of Rule 506 as to each partner.

Clients of an investment adviser or customers of a broker-dealer will always be considered "purchasers" regardless of the amount of discretion given to the investment adviser or broker-dealer.[177]

Rule 501(e)(3) provides that a noncontributory employee benefit plan within the meaning of ERISA shall be counted as a single purchaser where the trustee makes all investment decisions for the plan. This provision was added by the 1988 amendments to clarify that such a benefit plan counts as one purchaser even though it is *literally* organized for the specific purpose of acquiring the employer's securities.[178]

Pursuant to Rule 501(e)(1), issuers may exclude the following when calculating the number of purchasers under Rules 505 and 506: (1) any accredited investor; (2) any relative, spouse or relative of the spouse of a purchaser who has the same principal residence as the purchaser;[179] (3) any trust or estate in which a purchaser and any of the persons related to him (in the immediately preceding category or the immediately following category) collectively have more than 50% of the beneficial interest;[180] and (4) any corporation or other organization of which a purchaser and any of the persons related to him (in either of the two immediately preceding categories) collectively are the beneficial owners of more than 50% of the equity securities or equity interests.

For purposes of excluding a relative, spouse or related trust or corporation, it is not necessary that the other purchaser be counted under Rule 501(e). Consequently, if an accredited

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Q & A Release, *supra* note 36, Question 59, at 2637-12 to -13; *see also* RPII Fund, SEC No-Action Letter, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78, 991, at 78,893-94 (Jan. 4, 1989); Madison Partners, Ltd., 1982 SEC No-Act. LEXIS 1921, at *1 (January 18, 1982); Financial Planning Clinics Sec. Corp., 1981 SEC No-Act. LEXIS 4211, at *4 (Oct. 5, 1981); Kenai Oil & Gas, Inc., 1979 SEC No-Act. LEXIS 2704, at *1-5 (Mar. 5, 1979).

[177] *See* 17 C.F.R. § 230.501 (e), notes, (1993) (excluding certain purchasers from calculation of total number of purchasers under §§ 230.505(b) and 230.506(b) only).

[178] *See* Securities Act Release No. 6683, *supra* note 160, at 88,404.

[179] Regulation D does not define either "relative" or "principal residence."

[180] *See, e.g.*, Equity Management Corp., 1984 SEC No-Act. LEXIS 2591, at *1-2 (Sept. 21, 1984).

investor and her nonaccredited first cousin who shares the same principal residence both purchase in a Rule 506 offering, neither is counted.[181] If an accredited investor purchases in a Regulation D offering, but has the securities put in the name of herself and her spouse (the spouse taking no part in the investment decision), neither the accredited investor nor her spouse is counted. In this latter case, however, the SEC has indicated that the issuer may take the position that the spouse was not a purchaser at all because he took no part in the investment decision and because placement of the securities in a joint name may simply be a tax or estate planning technique.[182] The distinction between the two cases is significant because the issuer must satisfy all the terms and conditions of the applicable Regulation D exemption with respect to all "purchasers" whether or not they are excluded under the counting rules. In the case of the accredited and nonaccredited cousins sharing the same principal residence, neither is counted, but the nonaccredited cousin must still receive the required disclosures and must still satisfy the Rule 506 purchaser sophistication requirement.

In *Lane Enterprises, Inc.*,[183] the SEC staff indicated that an individual investor who purchases directly as to a portion of the securities and indirectly through a self-directed employee benefit plan as to another portion (for tax reasons) will count as one purchaser, presumably because only one investment decision was made.

c. *Aggregate Offering Price*

Rule 501(c) defines "aggregate offering price" as the "sum of all cash, services, property, notes, cancellation of debt, or other consideration to be received by an issuer for issuance of its securities."[184] The definition is relevant to Rules 504 and

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[181] *See* Q & A Release, *supra* note 36, Question 54, at 2637-12.

[182] *See*, Q & A Release, *supra* note 36, Question 55, at 2637-12.

[183] SEC No-Action Letter, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,421, at 77,364-71 (June 25, 1987).

[184] 17 C.F.R. § 230.501(c) (1993).

505 which are available only for offerings having a limited aggregate offering price. The definition is irrelevant to Rule 506.

The definition in Rule 501(c) goes on to specify that where securities are being offered for both cash and noncash consideration, the aggregate offering price shall be based on the price at which the securities are being offered for cash. Any portion of the aggregate offering price attributable to cash received in a foreign currency must be translated into United States currency at the currency exchange rate in effect at a reasonable time prior to or on the date of the sale of the securities. If securities are not offered for cash, the aggregate offering price must be based on the value of the consideration as established by bona fide sales of that consideration made within a reasonable time, or, in the absence of sales, on the fair value as determined by an accepted standard. Such valuations of noncash consideration must be reasonable at the time made.

As originally adopted, the first sentence of Rule 501(c) only referred to "consideration received." The SEC, however, took the position that the definition encompassed the total amount of securities offered for sale, not just those which were actually sold. In 1988, the SEC amended the definition to conform to their interpretation by inserting the words "to be."[185] Consequently, an issuer that offers $1,500,000 in common stock, but succeeds in selling only $900,000 of the securities offered, cannot, after the fact, claim reliance on the Rule 504 exemption.

The SEC has indicated that certain contributions and other payments relating to an investment need *not* be considered part of the aggregate offering price of the offering. For example, the interest component of installment payments of the purchase price is excludable.[186] Additional voluntary assessments are also excluded from calculation of the initial aggregate offering price. The SEC has warned, however, that such voluntary assessments are effectively a new offering and must be considered along with the original issuance for possible integration or, if not integrated, must have their own exemption from registration.[187] Unlike voluntary assessments, however, mandatory noncontingent assessments clearly constitute part of the aggregate offering price.[188] Payments which are mandatory with respect to the investor should always be included in the aggregate offering price, even if they are subject to contingencies beyond the control of the investor or to the discretion of the issuer.[189]

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[185] *See* Securities Act Release No. 6683, *supra* note 160, at 88,404.

[186] *See* Q & A Release, *supra* note 36, Question 33, at 2637-6 to -7.

The SEC has indicated that the aggregate offering price does not include property contributed by the sole general partner in a real estate limited partnership if contributed in exchange for a general partnership interest.[190]

The SEC has also indicated that royalty payments from mining or oil and gas property received by the seller of interests in such property are also excluded from the aggregate offering price.[191]

d. Purchaser Representative

Under Rule 506, if a purchaser who is not an accredited investor is unable to satisfy the purchaser sophistication standard, a purchaser representative acting alone or together with the purchaser or other purchaser representatives may qualify the purchaser for purposes of Rule 506.[192] To qualify as a purchaser representative, a person must in fact satisfy the following conditions or the issuer must reasonably believe[193] such person satisfies such conditions:

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[187] *See* Q & A Release, *supra* note 36, Question 34, at 2736-7.

[188] *See* Q & A Release, *supra* note 36, Question 35, at 2637-7.

[189] For example, the full amount of a letter of credit delivered to the issuer as part of the purchase of securities which may be drawn upon in the issuer's discretion should be considered in calculating the aggregate offering price. *See* Q & A Release, *supra* note 36, Question 36, at 2637-7. However, that portion of a partnership assessment made on the controlling partner of a partnership (as opposed to the minority partners) may not be included in the aggregate offering price based on the theory that the controlling partner's interest is not a security. *See* United States Cellular Corp., SEC No-Action Letter, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,507, at 77,564 (June 22, 1990); *see also supra* note 2.

[190] *See* Q & A Release, *supra* note 36, Question 31, at 2637-6. For further discussion of when investments in partnerships, limited partnerships or joint ventures constitute securities, see Long, *supra* note 2; Morgenstern, *supra* note 2.

[191] *See* Q & A Release, *supra* note 36, Question 32, at 2637-6.

[192] 17 C.F.R. § 230.506(b)(2)(ii) (1993).

(1) The purchaser representative is not an affiliate,[194] director, officer or other employee of the issuer, or the beneficial owner of 10% or more of any class of the equity securities, or 10% or more of the equity interests, in the issuer, unless the purchaser is affiliated with the purchaser representative as a relative or beneficial owner as specified in Rule 501(h)(1).[195]

(2) The purchaser representative has such knowledge and experience in financial and business matters that he is capable of evaluating, alone, or together with other purchaser representatives of the purchaser, or together with the purchaser, the merits and risks of the prospective investment.

(3) The purchaser representative is acknowledged in writing by the purchaser during the course of the transaction.

(4) Prior to the above acknowledgment, the purchaser representative discloses, in writing, to the purchaser any recent, existing or contemplated material relationship between himself

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[193] Substantiating reasonable belief with respect to eligibility to serve as a purchaser representative poses the same issues as substantiating reasonable belief with respect to accredited investor status. *See supra* notes 119-23 and accompanying text.

[194] Rule 501(b) defines an "affiliate" as "a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified." 17 C.F.R. § 230.501(b) (1993). This is the same definition as in Rules 144 and 405 under the Securities Act. *Id.* § 230.144(a)(1), .405.

The SEC staff has indicated that an officer of a corporate general partner of an issuer would fall within the definition of affiliate and, therefore, could not serve as a purchaser representative unless related to the purchaser in the manner specified in Rule 501(h)(1). *See* Q & A Release, *supra* note 36, Question 38, at 2637-7.

[195] An affiliated purchaser representative is permitted where the purchaser is:

> (i) A relative of the purchaser representative by blood, marriage or adoption and not more remote than a first cousin;
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> (ii) A trust or estate in which the purchaser representative and any persons related to him as specified in paragraph [(i)] or [(iii)] collectively have more than 50 percent of the beneficial interest (excluding contingent interest) or of which the purchaser representative serves as trustee, executor, or in any similar capacity; or
>
> (iii) A corporation or other organization of which the purchaser representative and any persons related to him as specified in paragraph [(i)] or [(ii)] collectively are the beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests.

17 C.F.R. § 230.501(h)(1)(i)-(iii) (1993).

or his affiliates and the issuer or its affiliates and any compensation received or to be received as a result of such relationship. Any fee that the issuer will pay to the purchaser representative must also be disclosed.[196] The acknowledgment referred to above and the relationship and fee disclosure must not only be in writing, but must also be made with specific reference to the prospective investment.[197]

In a Note to Rule 501(h), the SEC reminds persons acting as purchaser representatives to consider the applicability of the registration and antifraud provisions relating to broker-dealers in the Exchange Act and relating to investment advisers under the Investment Advisers Act of 1940.[198]

2. *Information Delivery Requirements*

As previously noted, Regulation D does not provide issuers with an exemption from the antifraud or civil liability provisions of the federal securities laws.[199] In the broadest sense, therefore, an issuer always has a duty to disclose all relevant, material information to the purchasers of its securities in order to avoid violation of such provisions, and nothing in Regulation D should be interpreted to the contrary. Rather, in recognition of the fact that certain classes of investors generally have the sophistication and bargaining strength to obtain from the issuer the information that is material to their investment decision, Regulation D provides that in certain instances the exemptions from registration will not be conditioned on a particular content, format or method of disclosure.

With this in mind, determination of the prescribed information delivery requirements under Regulation D becomes a two step analysis: (1) under Rule 502(b)(1), the issuer must determine whether prescribed information must be delivered to investors as a condition to the Regulation D exemption and (2) if information is required to be delivered, the issuer must determine the type of information prescribed under Rule 502(b)(2).

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[196] *See* Q & A Release, *supra* note 36, Question 39, at 2637-7.

[197] "Advance blanket acknowledgment, such as for 'all securities transactions' or 'all private placements', is not sufficient." 17 C.F.R. § 230.501(h) (1993).

[198] 17 C.F.R. 230.501(h) n.1 (1993); *see also* Markham Inv., Inc., 1984 SEC No-Act. LEXIS 1738, at *1-2 (Jan. 15, 1984).

[199] *See supra* note 52 and accompanying text.

With respect to step one, Rule 502(b)(1) specifies two instances in which prescribed information will not be required to be delivered as a condition to a Regulation D exemption: sales made exclusively under Rule 504 and sales made to accredited investors in offerings in reliance on Rule 505 or 506. Prior to the 1989 amendments, an issuer making an offering pursuant to Rule 505 or 506 was required to deliver prescribed information to all purchasers (including accredited investors) if any nonaccredited investor was a purchaser.[200] The requirement was revised to eliminate the need to provide specified information to accredited investors, even where other purchasers are included in the offering.[201] However, a note was added following the amended provision reminding issuers that it is advisable to provide information to *all* investors in view of the antifraud provisions of the federal securities laws.[202]

The 1989 amendments clarified that any required information must be furnished to investors within a "reasonable time" prior to sale.[203] However, no definition of "reasonable time" was provided by the amendments. The amendments would not appear to alter previous SEC indications that required information may be furnished all at once or in installments, so long as all installments are delivered a "reasonable time" prior to sale.[204]

With respect to step two, the specific information required to be delivered depends on whether the issuer is a reporting company under the Exchange Act.[205] In any event, the information provided must be in writing rather than oral form.[206]

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[200] *See* 1989 Amendment Release, *supra* note 43, at 80,047.

[201] *See* 1989 Amendment Release, *supra* note 43, at 80,047.

[202] 17 C.F.R. § 230.502(b)(1) (1993).

[203] *See* 1989 Amendment Release, *supra* note 43, at 80,047.

[204] *See* Q & A Release, *supra* note 36, Question 40, at 2637-8.

[205] *See supra* note 66.

[206] *See* Q & A Release, *supra* note 36, Question 42, at 2637-8.

a. *Information Required To Be Delivered by Nonreporting Issuers*

Rule 502(b)(2)(i) provides that an issuer who is not subject to the reporting requirements of the Exchange Act shall furnish certain designated information *"to the extent material to an understanding of the issuer, its business, and the securities being offered."*[207] The narrative and financial statement information is designated by reference to registration and reporting forms and requirements under the Securities Act and the Exchange Act. Applicable requirements depend on characteristics of the issuer and the size of the offering. These provisions were revised in 1993 to conform to the restructuring of the integrated registration and reporting system under the Securities Act and the Exchange Act effected by the SEC's 1992 and 1993 Small Business Initiatives.[208] In order to understand the Regulation D information delivery requirements as currently in effect, a review of this restructuring is necessary.

The SEC's Small Business Initiatives, in addition to expanding the Rule 504 exemption[209] and expanding and revamping Regulation A,[210] created a new integrated registration and reporting system for "small business issuers" (SBIs).[211] An SBI is defined as a U.S. or Canadian issuer (other than an investment company) having revenues less than $25 million and stock with less than $25 million in public float.[212]

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[207] 17 C.F.R. § 230.502(b)(2)(i) (1993) (emphasis added).

[208] *See* 1993 Small Business Initiatives Amendment Release, *supra* note 18. The 1992 Small Business Initiatives were proposed for comment in Securities Act Release No. 6924, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,931, at 2,481-574 (Mar. 11, 1992), and adopted in the 1992 Small Business Initiatives Amendment Release, *supra* note 18. At the same time the SEC adopted the 1992 Small Business Initiatives, it proposed additional initiatives for comment in Securities Act Release No. 6950, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,025, at 83,209-22 (July 30, 1992). The 1993 Small Business Initiatives finalized the revisions proposed in Release No. 6950. *See* 1993 Small Business Initiatives Amendment Release, *supra* note 18.

In addition to its 1992 and 1993 regulatory initiatives, in April 1992, the SEC arranged for the Congressional introduction of proposed legislation aimed at promoting capital formation for small businesses. The Small Business Incentive Act, H.R. 4938, S. Res. 2518, 102d Cong., 2d Sess. (1992), would raise from $5 million to $10 million the ceiling amount under § 3(b) of the Securities Act which empowers the SEC to enact exemptions from registration. This would permit the SEC to further increase the ceiling amount for Regulation A offerings. *See supra* note 32. The proposed legislation would also make a number of significant amendments to the Investment Company Act intended to facilitate formation of investment pools.

[209] *See supra* notes 46-49, 82-87 and accompanying text.

Before adoption of this new S-B system, companies of all sizes registered under the Securities Act and reported under the Exchange Act using the same integrated system of forms and disclosure requirements. The S-K system, which the SEC put into place in the late 1970's and early 1980's, consists of forms for registration (Forms S-1, S-2, S-3, *etc.*) and reporting (Forms 10-K, 10-Q, 8-K, *etc.*) cross-referenced to a central repository of disclosure requirements (Regulation S-K).[213] SBIs may now continue to register and report in the S-K system or elect to use the new S-B system.[214]

S-B has two levels: standard and transitional. Any SBI may elect to register and report on the standard level. The transitional level is only available for SBIs which have not registered more than $10 million of securities in a twelve-month period.[215] The transitional level is meant to help ease the transition of small businesses from nonpublic to public status.[216]

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[210] *See supra* note 32.

[211] *See also* Harold S. Bloomenthal, *Integrated Disclosure for Small Business Issuers (Parts I, II & III)*, 15 Sec. & Fed. Corp. L. Rep. 9-32 (1993); Harold S. Bloomenthal, *Transitional Integrated Disclosure System for Small Business Issuers (Parts I & II)*, 15 SEC. & FED. CORP. L. REP. 42-48, 52-56 (1993) [hereinafter *Transitional Disclosure System*]; Stanley Keller, *SEC Small Business Initiatives: New Opportunities Created*, INSIGHTS, June 1993, at 15 (discussing Small Business Initiatives, states' responses to initiatives, and further actions that should be taken). *See generally* 1992 Small Business Initiatives Amendment Release, *supra* note 18; 1993 Small Business Initiatives Amendment Release, *supra* note 18.

[212] *See* 17 C.F.R. § 228.10(a) (1993); *see also* 1992 Small Business Initiatives Amendment Release, *supra* note 18, at 62,171-175. "Public float" means the "aggregate market value of the issuer's securities held by non-affiliates." 17 C.F.R. § 228.10(a)(1) (1993).

[213] For a description of how the S-K system came into being and an overview of how it operates, see HAROLD S. BLOOMENTHAL, ET AL., SECURITIES LAW HANDBOOK, ch. 5 (1993 ed.).

[214] 17 C.F.R. § 239.9, .10 (1993). For Form SB-1, see 2 Fed. Sec. L. Rep. (CCH) ¶ 7312, at 6501-04 [hereinafter Form SB-1] (General Instructions A(1)) and for Form SB-2, see 2 Fed. Sec. L. Rep. (CCH) ¶ 7313, at 6511-13 [hereinafter Form SB-2] (General Instructions A(1)); *see also* 1992 Small Business Initiatives Amendment Release, *supra* note 18, at 62,172-75; 1993 Small Business Initiatives Amendment Release, *supra* note 18, at 84,126-127.

Each level consists of new and modified forms for registration and reporting which cross-reference to a common repository of disclosure requirements (Regulation S-B[217] or Form 1-A[218]). Disclosure requirements in the standard S-B level are patterned on the financial and narrative requirements previously contained in Form S-18, the old registration statement form for initial public offerings up to $7.5 million (rescinded in 1992 upon adoption of the S-B system).[219]

Disclosure requirements in the transitional S-B level are based on the financial and narrative requirements contained in Form 1-A of Regulation A under the Securities Act. Regulation A is an exemption from Securities Act registration which permits nonpublic companies to make unregistered public offerings in an amount aggregating up to $5 million per year.[220] The Regulation A exemption, which is structured like a mini-registration procedure, was revised significantly in 1992 as part of the SEC's Small Business Initiatives. One of the revisions permits corporate issuers to prepare an offering circular on Form 1-A in either a conventional format (Model B) or in a new question-and-answer format (Model A).

The basic Securities Act registration statement for the standard S-B level is new Form SB-2.[221] Form SB-2 is available regardless of offering size. It may be used for an IPO as well as subsequent offerings and for primary as well as secondary transactions.[222] Like the registration forms in the S-K system which cross-reference to numbered disclosure items in Regulation S-K, Form SB-2 cross-references to Regulation S-B.[223]

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[215] *See* Form SB-1, *supra* note 214 (General Instruction A(1)(a) & (b)).

[216] *See* 1993 Small Business Initiatives Amendment Release, *supra* note 18, at 84,118-19.

[217] Regulation S-B is a subpart of a new part 228 added to Chapter 17 of the Code of Federal Regulations and entitled "Integrated Disclosure System for Small Business." 17 C.F.R. §§ 228.10-702 (1993).

[218] 17 C.F.R. § 239.90 (1993).

[219] 17 C.F.R. § 234.28 (rescinded 1992).

[220] 1993 Small Business Initiatives Amendment Release, *supra* note 18, at 84,121. For a brief description of the Regulation A exemption as expanded and revamped by the 1992 Small Business Initiatives, see *supra* note 32.

[221] *See* Form SB-2, *supra* note 214; *see also* 1992 Small Business Initiatives Amendment Release, *supra* note 18, at 62,172-75.

The basic Securities Act registration statement for the transitional S-B level is new Form SB-1.[224] It may be used to register up to $10 million in securities per twelve-month period.[225] It, too, may be used for an IPO as well as subsequent offerings and for primary as well as secondary transactions.[226] Form SB-1 cross-references to Form 1-A for most of its disclosure requirements, with some supplementary items cross-referenced to Regulation S-B.[227] A corporate issuer may comply with Form SB-1 by following either the Model A (Q&A) or the Model B (conventional) format now contained in Form 1-A.[228]

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[222] *See* Form SB-2, *supra* note 214; *see also* 1992 Small Business Initiatives Amendment Release, *supra* note 18, at 62,172-75.

[223] The item numbers of Regulation S-B correspond to the item numbers of Regulation S-K (*e.g.*, Item 402 of Regulation S-B and Item 402 of Regulation S-K both cover executive compensation). However, where such requirements were simplified or not required by Form S-18, Regulation S-B generally tracks the substantive disclosure requirements of Form S-18. *Id.* at 62,172.

[224] *See* Form SB-1, *supra* note 214; *see also* 1993 Small Business Initiatives Amendment Release, *supra* note 18, at 84,125-29.

[225] *See* Form SB-1, *supra* note 214 (General Instruction A(1)).

[226] *See* Small Business Initiatives Amendment Release, *supra* note 18, at 84,120.

[227] *See* 17 C.F.R. § 239.9 (1993) (Parts I & II); *see also* 1993 Small Business Initiatives Amendment Release, *supra* note 18, at 84,127-28.

[228] *See* 17 C.F.R. § 239.9 (1993); Form SB-1, *supra* note 215 (Part I—Alternatives 1 & 2); *see also* 1993 Small Business Initiatives Amendment Release, *supra* note 18, at 84,127-28.

In addition to Forms SB-1 and SB-2, SBIs may also use modified versions of certain S-K registration forms for special types of offerings, including Form S-3 (for secondary-only offerings and certain other types of transactions), Form S-4 (for mergers and other business combination transactions) and Form S-8 (for offerings pursuant to employee benefit plans). *See* 1992 Small Business Initiatives Amendment Release, *supra* note 18, at 62,174; 1993 Small Business Initiatives Amendment Release, *supra* note 18, at 84,121-22. Narrative and financial disclosure requirements for SBIs key in to Regulation S-B or Form 1-A in the modified versions of such forms. *Id.*

Standard and transitional SBIs use the same forms for Exchange Act reporting in the S-B system. Annual reports are filed on new Form 10-KSB and quarterly reports on new Form 10-QSB.[229] Standard level disclosure cross-references to Regulation S-B. Transitional level disclosure based on Model A or Model B of Form 1-A is set forth in special instructions.[230] SBIs may also comply with special instructions to Form 8-K, Schedule 14A and Rule 14a-3 and prepare current reports, proxy statements and annual reports to shareholders based on standard or transitional S-B disclosure.[231]

The differences in narrative disclosure requirements among the four registration and reporting systems now available to an SBI (*i.e.*, S-K, standard S-B, transitional S-B in the Q & A format and transitional S-B in the conventional format) are not dramatic.[232] The differences in financial disclosure requirements are more significant. First, the S-B system, both standard and transitional, requires only two years of audited financials in registration statements and annual reports instead of the three years of audited financials required in the S-K system.[233] Second, financial statements in the S-B system must conform to generally accepted accounting standards, but need not conform to the SEC's additional financial statement requirements in Regulation S-X.[234] In addition, Item 310 of Regulation S-B (which governs financial statement disclosure for S-B filings, both standard and transitional) reduces the need for inclusion of audited financial statements of acquired businesses in registrations, proxy statements and Form 8-K filings of SBIs.[235]

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[229] 17 C.F.R. § 249.310b (1993) (Form 10-KSB); 17 C.F.R. § 249.308b (1993) (Form 10-QSB); *see also* 1992 Small Business Initiatives Amendment Report, *supra* note 18, at 62,171-72; 1993 Small Business Initiatives Amendment Report, *supra* note 18, at 84,120.

[230] 17 C.F.R. § 249.310b (1993) (Form 10-KSB); 17 C.F.R. § 249.308b (1993) (Form 10-QSB); *see also* 1992 Small Business Initiatives Amendment Report, *supra* note 18, at 62,171-72; 1993 Small Business Initiatives Amendment Report, *supra* note 18, at 84,120.

[231] 1992 Small Business Initiatives Amendment Release, *supra* note 18, at 62,171-72; 1993 Small Business Initiatives Amendment Report, *supra* note 18, at 84,119.

An issuer may continue filing registrations and reports in the standard S-B system until it fails to meet the SBI revenue or float test on two consecutive fiscal year ends. 17 C.F.R. § 239.10 (1993); Form SB-2, *supra* note 214; *see also* 1992 Small Business Initiatives Amendment Release, *supra* note 18, at 62,174. An issuer filing registrations and reports in the transitional level may continue doing so until (1) it registers more than $10 million in securities during any 12-month period, (2) it files a nontransitional registration or report, or (3) it ceases to be an SBI. 1993 Small Business Initiatives Amendment Release, *supra* note 18, at 84,119.

[232] For a line-item-by-line-item comparison of S-K versus S-B and standard S-B versus transitional, see the two multi-part Bloomenthal articles cited in note 211 *supra*. The transitional S-B/Q & A format is, of course, a radical departure in presentation for narrative disclosure, but the substantive content of disclosure is not significantly less than in the conventionally presented alternatives. In fact, it is more burdensome than the transitional Model B approach in a number of respects. *Accord Transitional Disclosure System*, *supra* note 211, at 55 (stating that "[t]he question-and answer format of Model A is of dubious advantage in the public offering context and no advantage in the context of Exchange Act reports . . . . [Model B] is likely to be the preferred choice for registrants that carefully weigh the alternatives").

As revised in the 1993 Small Business Initiatives, Rule 502 (b)(2)(i) requires nonreporting issuers to provide non-financial statement information based on its eligibility to use Regulation A or Securities Act registration forms. If the issuer is eligible to use Regulation A (*i.e.*, offering no more than $5 million in aggregate offering price in a continuous twelve-month period and no "bad boy" problems under Rule 262),[236] the issuer must provide the "*same kind of information*" as would be required in Part II of Form 1-A.[237] If the issuer is not eligible to use

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[233] 17 C.F.R. § 238.310 (1993); *see also* 1992 Small Business Initiatives Amendment Release, *supra* note 18, at 62,172; 1993 Small Business Initiatives Amendment Release, *supra* note 18, at 84,121-23.

[234] 17 C.F.R. § 238.310 (1993); *see also* 1992 Small Business Initiatives Amendment Release, *supra* note 18, at 62,172; 1993 Small Business Initiatives Amendment Release, *supra* note 18, at 84,121-23.

[235] Item 310 automatically waives the requirement of providing audited financial statements if such financials are not readily available and if the acquisition price, assets and net income of the acquired business do not exceed prescribed percentages of consolidated assets and net income of the acquiring SBI (20%—no audits; 40%—one year only). 17 C.F.R. § 228.310(c)(3)(ii) (1993). The SEC also indicated in the 1993 Small Business Initiatives Amendment Release (but not in the rules themselves) that SBIs without significant net income will likely be granted waivers from the requirement of providing acquired company financials under a 10%-of-net-income significance test if *revenues* of the acquired company do not exceed 10% of consolidated revenues of the acquiring SBI. 1993 Small Business Initiatives Amendment Release, *supra* note 18, at 84,122.

[236] *See supra* notes 32, 97-99 and accompanying text.

[237] 17 C.F.R. § 230.502(b)(2)(i)(1993).

Regulation A, it must provide the "*same kind of information*" as required in Part I of a registration statement filed under the Securities Act on the form that the issuer would be entitled to use (*e.g.*, Form SB-1, Form SB-2, Form S-1, Form S-4).

Rule 502(b)(2)(i) requires nonreporting issuers to provide financial statement information based on the size of the Regulation D offering. *For offerings up to $2 million*, issuers must provide the information required in Item 310 of Regulation S-B (*i.e.*, audited balance sheet as of the end of the most recent fiscal year, two years of audited statements of income, cash flows and changes in stockholders' equity and unaudited interim statements), except that only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited. *For offerings up to $7.5 million*, issuers must provide the information required in Form SB-2 (*i.e.*, the full set of audited and unaudited financials required in Item 310 of Regulation SB). *For offerings over $7.5 million*, issuers must provide the information required in a registration statement filed under the Securities Act on the form that the issuer would be entitled to use. For SBIs eligible to use Forms SB-1 or SB-2, this would include the full set of audited and unaudited financials required in Item 310 of Regulation S-B.[238] For other issuers, this would include the two audited balance sheets, three years of audited statements of income, cash flows and stockholders' equity and related unaudited interim statements required in Form S-1 and Regulation S-X.[239]

In each of the over-$2 million categories for financial statement disclosure, Rule 502(b)(2)(i) provides that an issuer which cannot obtain the audited financial statements required without "*unreasonable effort or expense*" may, instead, provide only an audited balance sheet (as of a date within 120 days of the start of the offering). The SEC has not defined and will not issue interpretations on the meaning of the "*unreasonable effort*

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[238] *See supra* notes 233-35 and accompanying text.

[239] *See* 17 C.F.R. § 239.11 (1993) (Securities Act Form S-1—Item 11(e)); 17 C.F.R. §§ 210.3-01 to -05 (1993) (Regulation S-X).

or expense" standard.[240] At the same time the SEC adopted the 1992 Small Business Initiatives, it proposed an amendment to Rule 502(b)(2)(i) that would have eliminated the audit requirement entirely for nonreporting issuers which did not already have audited financial statements available.[241] This radical proposal was not adopted in the 1993 Small Business Initiatives, although the SEC indicated that it would continue to explore appropriate revisions to the financial statement disclosure requirements with state regulators.[242]

As with all disclosure under the Securities Act, the form and substance of the specific disclosure required under Regulation D will ultimately be a function of materiality.[243] On one hand, since Regulation D does not provide issuers an exemption from the antifraud or civil liability provisions of the federal securities laws, all relevant, material information must be disclosed regardless of the specific line-item disclosure requirements upon which availability of a Regulation D exemption may be conditioned.[244] On the other hand, an issuer is only required to furnish information responsive to the forms prescribed in Rule 502(b)(2)(i) "*to the extent material to an understanding of the issuer, its business, and the securities being offered.*" The prescribed forms are therefore, strictly speaking, neither a maximum nor a minimum.

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[240] *See* Q & A Release, *supra* note 36, Question 48, at 2687-10.

[241] *See* Securities Act Release No. 6950, *supra* note 208, at 83,215.

[242] 1993 Small Business Initiatives Amendment Release, *supra* note 18, at 84,123.

[243] *See* Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988) (stating that fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important" in deciding whether to buy, hold or sell stock) (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976)).

[244] *See* 17 C.F.R. §§ 230.501-.508 (1993) (Preliminary Note 1) (stating that "[i]ssuers are reminded of their obligation to provide such further material information, if any, as may be necessary to make the information required under this regulation, in light of the circumstances under which it is furnished, not misleading"). This fundamental tenet of disclosure, that one cannot hide behind the limitations of the line items to avoid disclosure of material facts, runs throughout the federal securities law. *See, e.g.*, 17 C.F.R. § 230.408 (1993) (Exchange Act Rule 408 requiring any additional information); 17 C.F.R. § 240.12b-20 (1993) (Exchange Act Rule 12b-20 requiring any additional information).

Deciding, in any particular case, what information must be presented in light of this overriding materiality rule is the essential difficulty of Securities Act disclosure. The prefatory language to rule 502(b)(2)(i) appears to indicate that *how* information should be disclosed is also a function of materiality, *i.e.*, that information need not be disclosed precisely as required to be set forth in the applicable registration form. For example, if a balance sheet of a corporate general partner of an issuing limited partnership is deemed material, must it be audited as required by Form S-1 and Rule 502(b)? The answer to that question will depend on the facts and circumstances of the corporate general partner, not just the precise requirements of Form S-1. If the general partner is newly incorporated and has had no prior operations, the audit may not improve the quality of disclosure.[245]

The "*same kind of information*" language in the Rule 502(b)(2) provision on narrative disclosure,[246] like the prefatory language on materiality, appears also to permit variance from the prescribed disclosure forms, so long as such variance would not be materially misleading. In *Johnston v. Bumba*,[247] a federal district court indicated that material misstatements and omissions in a Regulation D offering memorandum not only may result in antifraud liability but may also prevent the memorandum from constituting the "*same kind of information*" required by the applicable form, thereby destroying the Regulation D exemption entirely and giving rise to rescission liability for violation of section 5 of the Securities Act. Except in the most extreme cases, equating material misstatements and omissions with complete failure to provide "the same kind of information" required as a condition to an exemption seems counter to the structure of the Securities Act and Exchange Act liability provisions, which separate antifraud liability from rescission liability for violating section 5, providing substantial defenses for the former but not for the latter. A comparable holding by the Second Circuit Court of Appeals in *SEC v. Manor Nursing Centers, Inc.*[248] has been roundly criticized.[249]

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[245] *See* Q & A Release, *supra* note 36, Question 43, at 2637-8 to -9; *see also* Weprin v. Peterson, 736 F. Supp. 1124, 1128-29 n.8 (N.D. Ga. 1988).

[246] It should be noted that, prior to the revisions to Rule 501(b)(2) effected by the 1993 Small Business Initiatives, the "same kind of information" language applied to both the narrative and financial statement disclosure requirements. Whatever such language means in terms of additional flexibility and latitude in disclosure has been eliminated from the financial statement requirements by the 1993 amendments.

[247] 764 F. Supp. 1263, 1277 (N.D. Ill. 1991).

Despite the theoretical flexibility afforded by the three so-called "rubber clauses" in Rule 502(b)(2)(i) (*i.e.*, "to the extent material," "the same kind of information" and "unreasonable effort or expense"), few practitioners have felt comfortable varying disclosure in Regulation D offerings by nonreporting issuers from that designated by reference to the applicable SEC forms.[250] Where strict compliance with the Rule 502(b)(2)(i) information requirements poses economic or other problems, practitioners will strongly advise limiting offering size to Rule 504 level or doing a Rule 505 or 506 offering exclusively to accredited investors, so as to avoid the problem of strict disclosure compliance altogether, rather than cut corners on disclosure in reliance on the murky meaning of the rubber clauses. The liberality of the accredited investor definition has, as a practical matter, done far more to alleviate the burdensome disclosure requirements of Regulation D and reduce the cost of small business capital formation under the Regulation D exemptions than any of the changes adopted in connection with the 1992 and 1993 Small Business Initiatives.[251] Even where an issuer is able to comply with the full requirements of Rule 502(b)(2)(i), many practitioners will strongly advise doing an all-accredited offering, if possible, so that loss of the exemption does not turn on compliance with Rule 502(b)(2)(i).[252]

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[248] 458 F.2d 1082 (2d Cir. 1972).

[249] *See, e.g.*, SEC v. Southwest Coal & Energy Co., 624 F.2d 1312, 1318 (5th Cir. 1980); Jon S. Readnoor, *Prospectus Liability for Failure to Disclose Post-Effective Developments: A New Duty and Its Implications*, 48 IND. L.J. 464, 469 (1973) (discussing *SEC v. Manor* and its implications); *cf.* Carl W. Schneider, *The Statutory Law of Private Placement*, 14 REV. SEC. REG., 869, 877 nn.35, 879 & 882-83 (1981) (criticizing similar reasoning.)

[250] *Accord* HICKS, *supra* note 1, § 7.03[3][b][i][A][I].

[251] If the 1993 Small Business Initiatives had eliminated the requirement that nonpublic companies provide audited financial statements, as was proposed by the SEC in Securities Act Release No. 6950, *supra* note 208, such a change would have been quite significant. Many practitioners consider the absolute requirement that an audited balance sheet be provided as one of the most unrealistic and oppressive aspects of Regulation D. *See* HICKS, *supra* note 1, § 7.03[3][b][i][A][I]. The changes to Rule 502(b)(2)(i) that actually were adopted in the 1993 Small Business Initiatives did not

b. *Information Required To Be Delivered by Reporting Issuers*

Regulation D affords two alternatives for reporting companies to comply with the applicable disclosure requirements. Under the first alternative, the reporting issuer may provide its

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substantively reduce the disclosure obligation at all. *See* 1993 Small Business Initiatives Amendment Release, *supra* note 18, at 84,123.

[252] In addition to the general disclosure requirements applicable to offerings by all nonreporting issuers under Rule 502(b)(2)(i), limited partnership syndications pose special disclosure problems reflected in a number of Regulation D provisions and interpretations. First, a limited partnership unable to obtain audited financial statements required for an offering in excess of $2 million without "unreasonable effort or expense" may furnish financial statements that have been prepared on the basis of federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards (GAAS) by an independent public or certified public accountant. *See* 17 C.F.R. § 230.502(b)(2)(i)(B) (1993). The SEC has interpreted this same rule to be applicable to audit requirements for financial statements of real estate operations acquired or to be acquired. *See* Q & A Release, *supra* note 36, Questions 46 & 47, at 2736-9 to -10. Limited partnerships are also required to provide certain financial information regarding general partners and to comply with special guides issued by the SEC for preparation of registration statements relating to mining operations, Guide 7, 17 C.F.R. § 229.801(g) (1993); oil & gas operations, Guides 2 & 4, *id.* §§ 229.801(b) & (d); and real estate operations, Guide 5, *id.* § 229.801(e). *See* Q & A Release, *supra* note 36, Questions 44 & 45, at 2637-9; *see also* 17 C.F.R. 228.102 (1993) (Regulation S-B Item 102—Instructions to Item 102(a)).

In Securities Act Release No. 6900, 7 Fed. Sec. L. Rep. (CCH) ¶ 71,125, at 61,987-97 (June 17, 1991), the SEC published its views concerning disclosure requirements applicable to limited partnership roll-up transactions and initial public offerings of limited partnership interests. Consideration of the important interpretive guidance in this release is essential for any limited partnership offering under Regulation D. Specific disclosure rules applicable to limited partnership roll-up transactions were added to Regulation S-K by Securities Act Release No. 6922, 7 Fed. Sec. L. Rep. (CCH) ¶ 72,438, at 62,148-65 (Oct. 30, 1991).

In addition, the SEC views Exchange Act Rule 10b-9, 17 C.F.R. § 240.10b-9 (1993), as requiring limited partnership issuers to disclose the possibility of purchases by the general partner of limited partner interests in order to close the minimum or maximum offering in a part-or-none or all-or-none "best efforts" underwriting, as well as the possible maximum amount of such purchases. *See* Q & A Release, *supra* note 36, Question 79, at 2637-6. Such purchases must be for investment rather than resale. *Id.*

annual report to shareholders for its most recent fiscal year (if such report complies with Rule 14a-3 or 14c-3 under the Exchange Act), its definitive proxy statement filed in connection with that annual report and, if requested in writing by the purchaser, its most recent Form 10-K or Form 10-KSB. If such reports are not yet available for the most recently completed fiscal year, an issuer may furnish the prior year's reports.[253] As a second alternative, a reporting issuer may provide the information contained in its annual report on Form 10-K or Form 10-KSB under the Exchange Act or in its registration statement on Form S-1, Form SB-1, Form SB-2 or Form S-11 under the Securities Act or on Form 10 or Form 10-SB under the Exchange Act, whichever filing is the most recent. The registration statement information required refers to Part I of each of the respective forms.[254] While this provision makes reference to specific forms, it does not require delivery of the actual documents. An issuer may instead prepare and deliver a separate document containing the same information.[255]

Whichever alternative is used, the issuer must also furnish any reports or documents required to be filed under sections 13(a), 14(a), 14(c) and 15(d) of the Exchange Act, since the distribution or filing of the report or registration statement comprising the basic disclosure, a brief description of the securities being offered, the use of proceeds from the offering and any material changes in the issuer's affairs that are not disclosed in the documents furnished.[256]

c. *Additional Information Delivery Requirements Applicable to Both Reporting and Nonreporting Issuers*

Whatever its reporting status, an issuer must also comply with certain additional disclosure requirements. The issuer must identify and make available to nonaccredited investors (upon their written request at a reasonable time prior to the sale of securities) the contents of exhibits which would be required to be filed as part of a registration statement or report, other than an annual report to shareholders (or part thereof) incorporated in a Form 10-K or Form 10-KSB filing.[257] The SEC has advised that legal opinions on the validity of the securities offered and material tax consequences should be identified and made available, tax opinions being especially significant in the context of tax incentive offerings.[258]

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[253] *See supra* note 36, Question 51, at 2637-10.

[254] *See* Q & A Release, *supra* note 36, Question 50, at 2637-10.

[255] *See* Adopting Release, *supra* note 26, at 84,916.

[256] 17 C.F.R. § 230.502(b)(2)(ii)(C) (1993).

The issuer must provide notice to all nonaccredited investors (at a reasonable time prior to purchase) of any material written information concerning the offering that was provided to any accredited investor, but not previously delivered to all nonaccredited investors. The issuer must furnish any such information upon written request within a reasonable time prior to purchase.[259]

The issuer must give each investor (at a reasonable time prior to purchase) the opportunity to ask questions, receive answers and obtain additional information which the issuer possesses or can acquire without unreasonable effort or expense that is necessary to verify the accuracy of information furnished.[260]

For business combinations or exchange offers, the issuer must furnish to each purchaser written information about any terms or arrangements of the proposed transaction that are materially different from those for all other security holders.[261]

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[257] *Id.* § 230.502(b)(2)(iii). In Hecker & Phillips, 1983 SEC No-Act. LEXIS 1671, at *1 (Jan. 21, 1983), the SEC staff confirmed that this requirement applies to both reporting and nonreporting issuers. In the case of reporting issuers, identification of exhibits is obviously as easy as looking at the registration statements and reporting forms making up the disclosure. The task is substantially more difficult for a nonreporting issuer. The nonreporting issuer must identify which form it is using as a model for compliance with Rule 502(b)(2)(i) and then determine from the exhibit section of Form 1-A, from Item 601 of Regulation S-B or from Item 601 of Regulation S-K, as the case may be, which exhibits would be required to be filed. *See* HICKS, *supra* note 1, § 7.03[3][b][ii].

[258] *See* Q & A Release, *supra* note 36, Question 52, at 2637-11; *see also Hecker & Phillips, supra* note 257; Peter I. Mason, SEC No-Action Letter, [1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,405, at 78,466-68 (Mar. 24, 1983); Hopper, Kanouff, Smith & Peryam, SEC No-Action Letter, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,300, at 78,093-96 (Sept. 10, 1982).

[259] 17 C.F.R. § 230.502(b)(2)(iv)(1993).

[260] *Id.* § 230.502(b)(2)(v).

In offerings pursuant to Rule 505 or 506, issuers are required to provide to any nonaccredited purchaser written disclosure of the limitations on resale of the securities under Rule 502(d).[262]

3. *Integration*

The exemptions contained in Rules 504, 505 and 506 apply to "offerings," not to individual offers and sales.[263] In order for any particular offer or sale to be exempt under Rules 504, 505 or 506, such offer or sale (and all other offers or sales which are part of the same "offering" of securities) must meet all applicable conditions of those rules.[264] The term "offering" is not defined under the Securities Act or Regulation D. The integration concept was developed by the SEC in order to ascertain, based on common characteristics, all of the transactions constituting part of a single "offering" for purposes of determining if such offering fits within one of the transactional exemptions from Securities Act registration.[265]

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[261] *Id.* § 230.502(b)(2)(vi). In addition to the basic information required by Securities Act Form S-4, 17 C.F.R. § 239.25 (1993), this is the registration statement form for business combination transactions. *Id.* § 230.502(b)(2)(vi).

[262] *Id.* § 230.502(b)(2)(vii). For discussion of the limitations on resale, see *infra* notes 337-62 and accompanying text. This requirement was added by the 1989 amendments to ensure that those investors least likely to understand the illiquidity of restricted securities receive necessary disclosure. *See* Securities Act Release No. 6811, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,345, at 89,600 (Dec. 20, 1989).

[263] *See supra* note 89; *see also* HICKS, *supra* note 1, § 7.03[2][a]; 3 LOSS & SELIGMAN, *supra* note 1, at 1211 (stating that "[b]ecause securities subject to a transactional exemption are exempted on a transaction-by-transaction basis, the possibility exists that an apparently exempt transaction is actually part of a larger offering for which no exemption is available.").

[264] *See* 17 C.F.R. § 230.502(a) (1993).

[265] *Id.* § 230.502(a); *see* Caviness v. Derand Resources Corp., 983 F.2d 1295, 1299 (4th Cir. 1993) (holding that integration concept relates solely to availability of exemptions and not to running of statute of limitations); *see also* 3 LOSS & SELIGMAN, *supra* note 1, at 1211-12 (stating that "[t]he concept of 'integrating' offerings is intended to prevent an issuer from avoiding registration by structuring a transaction in two or more apparently exempt offerings (or one exempt and one nonexempt offering) when they actually should be considered a single nonexempt transaction"); Russell B. Stevenson, Jr., *Integration and Private Placements*, 19 REV. SEC. & COMMODITIES REG.

a. Five-Factor Test

In 1962, the SEC enunciated five common characteristics that it considers relevant to the determination of whether sales should be regarded as part of the same offering and, thus, integrated.[266] The five common characteristics are: (1) whether the sales are part of a single plan of financing; (2) whether the sales involve issuance of the same class of securities; (3) whether the sales have been made at or about the same time; (4) whether the same type of consideration is received; and (5) whether the sales are made for the same general purpose.[267] Case law interpreting the five-factor test outlined by the SEC has been relatively sparse. The opinions contain limited analysis of the integration issue and frequently involve determinative factors unrelated to the integration issue (such as fraud).[268] Furthermore, because of the factual nature of integration determination, the SEC adopted a policy in 1979 not to give interpretive advice on the topic.[269] In 1985, the SEC discontinued this policy.[270] Since then, the SEC has taken a number of significant interpretive positions, but elucidation of the five-factor test has been extremely limited, and the whole area remains very murky. Neither the courts nor the SEC have ever clearly specified the relative weight to be given each of the

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49, 49 (1986) (stating that "[t]he statute defines neither 'issue' nor 'offering', but these terms obviously must be interpreted in a way that prevents issuers from circumventing the Act's registration requirements by dividing what is economically a single transaction into a series of separate transactions, each of which can qualify for an exemption").

[266] *See* Securities Act Release No. 4552, 1 Fed. Sec. L. Rep. (CCH) ¶¶ 2770-2783, at 2918 (Nov. 6, 1962).

[267] *Id.*

[268] *See* Riseman v. Orion Research, Inc., 749 F.2d 915, 916 (1st Cir. 1984); SEC v. Murphy, 626 F.2d 633, 645-46 (9th Cir. 1980); Doran v. Petroleum Management Corp., 545 F.2d 893, 901 n.9 (5th Cir. 1977); Johnston v. Bumba, 764 F. Supp. 1263, 1272 (N.D. Ill. 1991); Koehler v. Pulvers, 614 F. Supp. 829, 840-41 (S.D. Cal. 1985); Currie v. Cayman Resources Corp., 595 F. Supp. 1364, 1376-77 (N.D. Ga. 1984), *aff'd in part, rev'd in part and remanded*, 835 F.2d 780 (11th Cir. 1988). For additional cases, see 3 LOSS & SELIGMAN, *supra* note 1, at 1213-14 n.8.

[269] *See* Clover Financial Corp., 1979 SEC No-Act. LEXIS 2578 (Apr. 5, 1979).

[270] *See* LaserFax, Inc., SEC No-Action Letter, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,136, at 76,614-15 (Aug. 15, 1985).

five factors or how many factors it takes to require integration.[271] Integration is clearly not limited, however, to cases in which all five factors are present.[272] The first and the fifth factors, which appear to have some overlap in meaning, have been said to be more important than the other factors.[273]

b. Related-Issuer Integration

Closely related to the issue of whether two apparently distinct offerings by the same issuer should be integrated is the issue of whether offerings by two related issuers should be treated as if they were by the same issuer for purposes of determining exemption availability.[274] Related-issuer integration may arise in many contexts.[275]

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[271] *See generally* ROBERT J. HAFT, ANALYSIS OF KEY SEC NO-ACTION AND INTERPRETIVE LETTERS, ch. 6 (rev. ed. 1992-1993). Criticism of the five-factor approach as "subjective" and "indeterminate" has been a recurring chorus. *See* ABA Committee on Federal Regulation of Securities, *Integration of Securities Offerings: Report of the Task Force on Integration*, 41 BUS. LAW. 595, 596 (1986); Darryl B. Deaktor, Comment, *Integration of Securities Offerings*, 31 U. FLA. L. REV. 465, 500-01 (1979) (stating that only one court that "wrestl[ed] with the integration dilemma expressly relied upon prior interpretations of the SEC"); Stevenson, *supra* note 265, at 50. Nonintegration is, of course, part of the burden of proof that must be borne by the party relying on the exemption. *See supra* note 14 and accompanying text.

[272] *See, e.g.*, SEC v. Murphy, 626 F.2d 633, 645-46 (9th Cir. 1980) (finding that offerings were integrated despite fact that third factor--i.e. separation in time between system offerings--suggested that offerings were not integrated); 3 LOSS & SELIGMAN, *supra* note 1, at 1222 n.21 (stating it is not necessary to negate all five factors to avoid integration).

[273] HICKS, *supra* note 1, § 7.03[2][c][i]; 3 LOSS & SELIGMAN, *supra* note 1, at 1222; Stevenson, *supra* note 265, at 52. While Loss and Seligman admit a "considerable overlap" between the first and fifth factors, they suggest the following distinction:

> Although Commission staff's no-action letters are not entirely consistent, a plan of financing tends to refer to factors such as the method of offering, the security, the timing of plans for raising capital, and whether the offerings are financially interdependent. In contrast, the purpose of an offering normally refers to the use of proceeds.

3 LOSS & SELIGMAN, *supra* note 1, at 1214.

Whether these two factors are more important, or simply more subjective and therefore discussed at greater length in more cases, is less than clear. For attempts to extract other helpful generalizations from the cases and interpretive advice on the five factors, see 3 LOSS & SELIGMAN, *supra* note 1, at 1214-28; Stevenson, *supra* note 265, at 51-55.

Pre-1979 SEC interpretations frequently dealt with the integration questions posed by limited partnership offerings where the same general partner sponsored, either directly or through affiliates, a number of different limited partnerships. The principal issue in such offerings was whether the related issuers should be treated as one or as discrete issuers making separate offerings under separate exemptions. A subcommittee of the Business Law Section of the American Bar Association developed an analytical approach to identifying discrete partnership offerings involving the same or related sponsors in an important report surveying the SEC interpretive authority from this period.[276] While the SEC has indicated that the five-factor test should apply to the question of related-issuer integration,[277] the ABA subcommittee recommended that analysis focus on whether the offerings in question involve (1) separate legal entities with separate books, records and funds, (2) entities with economic independence in meeting their respective investment objectives and (3) separate application of proceeds.[278] In *Johnston v. Bumba*,[279] however, the court integrated a series of partnership offerings based on finding five of the SEC's traditional five factors, even though separate legal entities existed and there were arguments regarding economic independence and separate application of proceeds.[280]

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[274] *See* HICKS, *supra* note 1, § 7.03[2][d].

[275] One writer further subdivides this brand of integration into "venture integration" and "issuer integration". Stevenson, *supra* note 265, at 56-57. The first "involves offerings by two or more distinct legal entities whose economic fortunes are so intertwined that they are properly treated as one issuer." *Id.* at 56. The second arises primarily in the context of franchising or licensing arrangements where the franchisor or licensor "will seek to raise capital for its own operation through the sales of securities issued by separate entities that are to be franchisees or licensees." *Id.* at 57.

[276] *See* ABA Subcommittee on Partnerships, Trusts and Unincorporated Associations, *Integration of Partnership Offerings: A Proposal for Identifying a Discrete Offering*, 37 BUS. LAW. 1591 (July 1982).

[277] *See* Intuit Telecom, Inc., 1982 SEC No-Act. LEXIS 2328 (Mar. 24, 1982).

[278] *See* ABA Subcommittee, *supra* note 276, at 1610-24. The report contains additional recommended rules applicable in cases in which assets to be purchased with offering proceeds have not been identified to investors. *Id.*; *see also* HICKS, *supra* note 1, § 7.03[2][d][ii].

[279] 764 F. Supp. 1263 (N.D. Ill. 1991).

c. Recent Interpretive Advice

Since 1985, one area of focus in SEC interpretive advice has been integration of purportedly separate exempt offerings with registered public offerings carried out in close time proximity by the same issuer.

In *LaserFax, Inc.*,[281] the SEC refused to rule that a "bridge" or "mezzanine" private placement of convertible debentures would not be integrated with a registered public stock offering made within six months after the private offering. In so concluding, the SEC focused on the five-factor guidelines, not mentioning possible application of Rule 152 under the Securities Act (which provides that a transaction not involving a public offering at the time it is made continues to be exempt under section 4(2) "although subsequently thereto the issuer decides to make a public offering and/or files a registration statement").[282]

In *Verticom, Inc.*,[283] the SEC staff reconsidered its position in *LaserFax*, interpreting Rule 152 as preventing integration of a private "bridge" or "mezzanine" financing with a subsequent public offering, despite the fact that the public offering was clearly contemplated by the issuer at the time of the private financing. The interpretation was limited, however, since Rule 152 only applies to section 4(2) (and Rule 506) offerings. The SEC has refused to endorse a similar nonintegration position with respect to a prior Rule 504 offering, but has concurred that a prior Rule 505 offering, which also satisfied the conditions of Rule 506, need not be integrated with a subsequent public offering.[284] Commentators have suggested that issuers undertaking "bridge" or "mezzanine" financing implement safeguards such as: (1) requiring that the financing (unless it is strictly a bank type debt financing) be completed before filing the registration statement; (2) keeping the number of investors small and truly qualified; (3) strictly qualifying under section 4(2) or Rule 506, with strong documentation; and (4) providing complete and adequate disclosures to investors in order to meet the access requirement of section 4(2) and the information requirement of Rule 506.[285]

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[280] *Id.* at 1272; *see also* Black Box Inc., SEC No-Action Letter, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,510, at 77,571-83 (June 26, 1990) (indicating that spinoff of subsidiary's stock by parent corporation would not integrate with concurrent public offering of parent's securities on grounds that two offerings involved separate issuers).

[281] SEC No-Action Letter, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,136, at 76,614-15 (Aug. 15, 1985).

[282] 17 C.F.R. § 230.152 (1993); *see* 3 LOSS & SELIGMAN, *supra* note 1, at 1225 (stating that "[t]he purpose of [Rule 152] is to permit an issuer that contemplated or began a private offering to decide subsequently to make a public offering without risk of the initial private offering's being integrated into the public offering.").

[283] 1986 SEC No-Act. LEXIS 1751 (Feb. 12, 1986).

In *Black Box Inc.*,[286] the SEC considered the case of a highly leveraged issuer in default under its debt. The issuer planned to do a recapitalization involving the unregistered issuance of convertible debentures to a limited number of existing institutional lenders and new investors at the same time it issued common stock for cash in a registered public offering. The recapitalization and the public offering were contingent upon each other and were structured to close simultaneously. The SEC confirmed that, if investors in the recapitalization signed binding purchase agreements before the filing of the registration statement, Rule 152 would prevent integration of the recapitalization and the public offering. The

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[284] *Compare* Sonnenblick, Parker & Selvers, 1986 SEC No-Act. LEXIS 1565, at *1-2 (Jan. 1, 1986) (stating that offering must be integrated because sale involves same class of securities) *with* The Immune Response Corp., 1987 SEC No-Act. LEXIS 2629, at *1 (Nov. 2, 1987) (stating no integration was necessary when private placement of securities did not meet previously listed factors).

[285] THE CORPORATE COUNSEL March-April 1986, at 5; *see also* JBI Inc., 1989 SEC No-Act. LEXIS 999 (Sept. 28, 1989); Country First Bank, 1989 SEC No-Act. LEXIS 549 (March 31, 1989); Vintage Group, Inc., SEC No-Action Letter, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,700, at 77,978 (Apr. 11, 1988); Vulture Petroleum Corp., SEC No-Action Letter, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,407, at 77,319-20 (Dec. 31, 1986). *See generally* Lyman Johnson & Steve Patterson, *The Reincarnation of Rule 152: False Hope on the Integration Front*, 46 WASH. & LEE L. REV. 539 (1989).

[286] SEC No-Action Letter, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,510, at 7751-83 (June 26, 1990).

SEC went on to confirm, however, that even offers and sales of the convertible debentures made *after* the filing of the registration statement would not integrate with the public offering (although Rule 152 would not be applicable) if such offers and sales were made exclusively to a limited number of institutional investors.

In *Squadron, Ellenoff, Pleasant & Lehrer*,[287] the SEC confirmed that its advice in *Black Box* did not turn on the financially troubled nature of the issuer and that its position would have been the same even if the recapitalization had involved issuance of common stock instead of convertible debentures. The SEC indicated that the determinative feature from an integration perspective was the nature and number of offerees and purchasers in the recapitalization:

> [T]he *Black Box* policy position on integration was simply a formal articulation of an informal position the staff has taken previously with respect to simultaneous registered offerings and unregistered offerings to a limited number of first tier institutional investors in connection with structured financings. . . . The staff interprets the position to be limited in applicability to situations where a registered offering would otherwise be integrated with an unregistered offering to (1) persons who would otherwise be qualified institutional buyers for purposes of Rule 144A and (2) no more than two or three large institutional accredited investors.[288]

The *Black Box* letter and its progeny appear to indicate that integration between an unregistered transaction and a registered public offering (as opposed to integration between two unregistered transactions) may turn entirely on a sixth factor (*i.e.*, nature and number of offerees and purchasers in the unregistered transaction) rather than any of the five factors the SEC articulated in 1962.[289]

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[287] 1992 SEC No-Act. LEXIS 363 (Feb. 28, 1992).

[288] *Id.* at *1-2. For a discussion of the definition of qualified institutional buyer under Securities Act Rule 144A, see *infra* notes 356-58 and accompanying text.

[289] *See* Stevenson, *supra* note 265, at 55-56. Additional recent interpretive advice in the area of integration may be found in Monitrend Inv. Management, Inc., SEC No-Action Letter, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,696, at 77,966-

d. Regulation D Safe Harbor

The SEC has injected some objectivity into the shadowy interstices of integration by including a safe harbor provision in Rule 502(a) of Regulation D.[290] Rule 502(a) provides that any offers and sales made more than six months before the start of a Regulation D offering or made more than six months after completion of a Regulation D offering will not be integrated with such Regulation D offering, so long as during both the six-month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class of securities as those offered in the Regulation D offering (other than offers and sales pursuant to an employee benefit plan).[291]

The six-month safe harbor in Rule 502(a) provides a shield from integration for a Regulation D offering, but it does not shield any other exemption.[292] For example, if an issuer completes a public intrastate offering of its common stock under section 3(a)(11) seven months before commencing a Rule 505 offering, with no offers or sales of common stock in the interim, the Rule 502(a) safe harbor would prevent the Rule 505 exemption from being lost by integration with the public intrastate offering. It would not, however, prevent the section 3(a)(11) exemption from being lost by integration with the Rule 505 offering. Whether the section 3(a)(11) offering would integrate with the Rule 505 offering would depend on application of the five-factor test.[293] It should be noted that Rule

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68 (Mar. 31, 1988); Frontier Capital Management Co., 1988 SEC No-Act. LEXIS 1753 (July 13, 1988); North American Leisure Group, Inc., 1988 SEC No-Act. LEXIS 1713 (Dec. 15, 1988); Nigh Sav., Inc., 1987 SEC No-Act. LEXIS 2447 (Sept. 15, 1987); NABA Sports Corp., 1987 SEC No-Act. LEXIS 2423 (Sept. 9, 1987); Bridge Info. Sys., 1987 SEC No-Act. LEXIS 2627 (Oct. 8, 1987); Nigh Sav. Inc., 1987 SEC No-Act. LEXIS 2253 (July 25, 1987); Block 16 Office Partners, 1987 SEC No-Act. LEXIS 2424 (June 19, 1986).

[290] 17 C.F.R. § 230.502(a) (1993).

[291] For general discussion of the Regulation D integration safe harbor, see HICKS, *supra* note 1, § 7.03[2][b]; 3 LOSS & SELIGMAN, *supra* note 1, at 1222-25.

[292] In this sense, the safe harbor provision of Rule 502(a) is a "one way" provision. 3 LOSS & SELIGMAN, *supra* note 1, at 1224.

[293] *Id.;* JENNINGS, ET AL., *supra* note 1, at 450.

147,[294] the safe harbor exemption under section 3(a)(11), contains a six-month integration shield which is almost identical to that contained in Rule 502(a) and which would prevent the public intrastate offering from being integrated with the subsequent Rule 505 offering, assuming the public intrastate offering had been carried out in compliance with Rule 147.[295]

The six-month safe harbor protects two offerings ("A" and "B") from integrating with each other if they are more than six months apart, even though an employee benefit offering ("C") occurs in between them. The safe harbor, however, does not itself provide for nonintegration of offerings A or B with offering C. Whether such offerings must be integrated will be judged in accordance with the five-factor test.[296] Transactions included in offering C, which are eligible for exemption under Rule 701, the Securities Act exemption for compensatory plans and contracts adopted by the SEC in 1988, however, will not be integrated with offers and sales pursuant to other Securities Act exemption.[297]

Even if not integrated, offerings may have to be aggregated with other sales in reliance on Rule 504 or 505 for purposes of the aggregate offering price calculation.[298] To illustrate, a Rule 504 offering of common stock completed in January would not integrate with a Rule 505 offering begun the following October due to the Regulation D six-month safe harbor (assuming no intervening offers or sales except pursuant to an employee benefit plan). The Rule 504 offering would, however, aggregate with the subsequent offering for purposes of calculating the maximum aggregate offering price of the Rule 505 offering. And, just as offerings may aggregate without integrating, they may also integrate without aggregating. For example, a $10 million Rule 506 offering in January may, in effect, prevent reliance on Rule 504 for a similar offering until the six-month safe harbor is available. While a Rule 506 offering does not *aggregate* with a Rule 504 offering, it could *integrate*, resulting in loss of the 504 exemption due to exceeding the maximum aggregate offering price.[299]

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[294] 17 C.F.R. § 230.147 (1993).

[295] *See infra* Section III(C) in *Financing a Small Business (Part II)*.

[296] *See* Q & A Release, *supra* note 36, Question 53, at 2637-11; Pacific Physician Services, Inc., 1985 SEC No-Act. LEXIS 2456 (Aug. 20, 1985); Bridge Info. Sys., Inc, 1987 SEC No-Act. LEXIS 2627 (Oct. 28, 1987). *See generally* HICKS, *supra* note 1, § 7.03[2][b].

For discussion of the SEC's policy toward nonintegration of exempt domestic offerings with simultaneous offerings abroad, see *supra* notes 63-65 and accompanying text; *see also* HICKS, *supra* note 1, § 7.03[2][e].

[297] *See infra* notes 514-19 and accompanying text in *Financing a Small Business (Part II)*.

[298] *See, e.g.*, Robert T. Willis, Jr., P.C., 1988 SEC No-Act. LEXIS 34 (Jan. 18, 1988).

4. *Limitation on Manner of Offering*

Except in the case of Rule 504 offerings, neither the issuer nor any person acting on its behalf may offer or sell securities pursuant to a Regulation D exemption in any form of general solicitation or advertising.[300] Under Rule 502(c), general solicitation or advertising includes, but is not limited to: any advertisement, article, notice or other communication published in any newspaper, magazine or similar media or broadcast over television or radio; and any seminar or meeting whose attendees have been invited by any general solicitation or advertising.[301]

The basic notion underlying the prohibition is that the sort of broad and relatively indiscriminate selling effort that may be involved in a public offering is simply inconsistent with the limited, nonpublic exemptive character of Rules 505 and 506 under Regulation D. As developed and interpreted by the courts and the SEC, the prohibition is intended to help assure that the offering never reaches persons who need the protections of the Securities Act, because they lack access to the kind of information registration normally provides or the ability to interpret such information.[302] With this rationale, one might assume that application of the prohibition to a particular communication would turn on the nature (*e.g.*, investment sophistication, access to information) and perhaps, the number of persons to whom the communication was directed.[303] SEC interpretations indicate, however, that *how* the communication is made is also important. For example, the SEC has indicated that an offer directed solely to accredited investors, but made by means of general solicitation (such as a newspaper advertisement inviting their participation) may be deemed a general solicitation in violation of Rule 502(c).[304] Determining whether a particular communication is general solicitation or general advertising requires consideration of the number, identity and background of offerees as well as the timing, subject matter and manner of the communication used to solicit them.

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[299] For more discussion of the relationship between integration and aggregation in Regulation D, see Q & A Release, *supra* note 36, Question 70, at 2637-15.

[300] 17 C.F.R. § 230.502(c) (1993).

[301] *Id.*

[302] *See* Rutheford B. Campbell, Jr., *The Plight of Small Issuers (And Others) Under Regulation D: Those Nagging Problems that Need Attention*, 74 KY. L.J., 127, 137-43

To determine if general solicitation or advertising has destroyed a Regulation D offering requires a two-step analysis.[305] First, does the communication in question constitute general solicitation or advertising? Second, if it does, is the communication being used by the issuer or by someone on the issuer's behalf to offer or sell the securities? If either question can be answered in the negative, then the issuer will not be in violation of Rule 502(c). The SEC has stated that questions under Rule 502(c), since they typically involve an extensive analysis of facts and circumstances, generally will not be questions upon which the SEC will offer interpretive guidance.[306] Nevertheless, the SEC has, in recent years, offered a

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(1985); Stuart R. Cohn, *Securities Markets for Small Issuers: The Barrier of Federal Solicitation and Advertising Prohibitions*, 38 U. FLA. L. REV. 1 (1986); Gary D. Kipson & Leslie Scharfman, *General Solicitation in Exempt Offerings*, 20 REV. SEC. & COMMODITIES REG. 8 (1987); *see generally* Patrick Daugherty, *Rethinking the Ban on General Solicitation*, 38 EMORY L.J. 67 (1989).

[303] Daugherty, *supra* note 302, at 75-87.

[304] *See* Q & A Release, *supra* note 36, Questions 60 & 73, at 2637-13, -15.

[305] *See* Q & A Release, *supra* note 36, Questions 60 & 73, at 2637-13 (explanatory material preceding Question 60).

[306] *See* Q & A Release, *supra* note 36, Questions 60 & 73, at 2637-13 (explanatory material preceding Question 60). *See, e.g.*, Randall S. Dalton, 1984 SEC No-Act. LEXIS 2315 (June 22, 1984).

considerable amount of interpretive advice with respect to certain aspects of the Rule 502(c) requirement.

a. Does the Communication in Question Constitute General Solicitation or Advertising?

The U.S. Supreme Court explicitly rejected the notion that a strict numerical test should govern availability of the private placement exemption under section 4(2) in *SEC v. Ralston Purina Co.*[307] The Court indicated that, while the number of offerees involved was not irrelevant, it was the offerees' ability to fend for themselves — their nature not their number — that would be determinative of the nonpublic nature of the transaction for purposes of section 4(2).[308] Since *Ralston Purina*, the "public offering" and "general solicitation" concepts have developed in tandem.[309] In *Woodtrails-Seattle, Ltd.*,[310] the SEC indicated that solicitation by the general partner of a limited partnership, directed at 330 limited partners in other active partnerships formed by the same general partner, would not constitute general solicitation or general advertising. The SEC based its position on the pre-existing relationship with the proposed offerees which put the general partner in a position to determine that the prospective investors met certain suitability standards and sophistication levels.[311]

The *Woodtrails* letter reaffirms two important points. First, although offeree suitability and sophistication are not explicit requirements for *any* Regulation D exemption, they become key factors in Rule 505 and Rule 506 via the prohibition on general solicitation and general advertising.[312] Second, the SEC views the prohibition as turning not so much on the actual suitability of the offerees receiving a communication by or on behalf of the issuer, but rather on the ability of the communicator to assess accurately suitability and sophistication before the communication is made (*e.g.*, through a pre-existing business relationship).[313]

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[307] 346 U.S. 119 (1953).

[308] *Ralston Purina*, 346 U.S. at 124-25; *see infra* notes 381-90 and accompanying text in *Financing a Small Business (Part II)*.

[309] *See* Daugherty, *supra* note 302, at 75. This relationship is clear in the SEC staff's answer to Question 73 in the Q & A Release. *See* Q & A Release, *supra* note 36, Question 73, at 2637-15.

[310] SEC No-Action Letter, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,342, at 78,284-85 (July 8, 1982).

[311] *See* Q & A Release, *supra* note 36, at 2637-13 (explanatory material preceding Question 60) (stating that "[t]he general partner represented that it believed each of the solicitees had such knowledge and experience in financial and business matters that he or she was capable of evaluating the merits and risks of the prospective investment").

In subsequent interpretive letters, the SEC has continued to stress the importance of a pre-existing relationship with offerees whereby their suitability and sophistication are known in determining whether a solicitation is general. Where a sufficient pre-existing relationship exists, as in *Woodtrails*, large numbers of offerees do not appear to be a problem. For example, in *Mineral Lands Research & Marketing Corp.*,[314] the

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[312] One of the important differences between Rule 506 and its predecessor, Rule 146, is that Rule 506 does not have the explicit, two-step requirement of offeree qualification followed by purchaser qualification. *See supra* notes 110-111 and accompanying text. Although the SEC eliminated explicit offeree qualification in Rule 506, it could not simply abandon what the Supreme Court had determined to be the key characteristic of an exempt offering under § 4(2). To do so would be to overstep the SEC's rulemaking authority under § 4(2). *See* HICKS, *supra* note 1, § 7.03[4][f].

The SEC was not similarly limited in its rulemaking under § 3(b) of the Securities Act, as exhibited by the SEC's elimination of the prohibition on general solicitation and advertising altogether from Rule 504 in the Small Business Initiatives. Professor Hicks suggests a number of reasons why offeree qualification in the form of a prohibition on general solicitation and advertising makes sense even absent a statutory mandate. *Id.*

[313] While offeree qualification in the form of the prohibition on general solicitation and advertising may be an inevitability for a workable private or limited exemption, the SEC's pre-existing relationship concept has been criticized by many as being a needlessly narrow means of dealing with the problem. *See* Morgenstern, *supra* note 25, at 272 n.76 (stating that "[m]any practitioners believe that the SEC's interpretation of general solicitation is far too narrow and impractical, and does not reflect the reality of industry custom."). The SEC has tried to downplay the pre-existing relationship requirement at times. For example, in Securities Act Release No. 6812, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,346, at 89,661 n.18 (Dec. 20, 1988), the SEC noted:

> The Commissions's staff has issued a number of interpretive letters concerning the general solicitation requirement which have involved prior relationships. . . . The staff has never suggested, and it is not the case, that prior relationship is the only way to show the absence of a general solicitation.

On the other hand, the SEC has offered no suggestion in its interpretive advice of any other predictable means of complying with the prohibition.

[314] 1985 SEC No-Act. LEXIS 2811 (Dec. 4, 1985).

SEC indicated that an offer extended to over 600 clients of an insurance broker may not constitute general solicitation if the pre-existing relationship with the clients provides an adequate basis for awareness of the financial circumstances or sophistication of the clients.[315] On the other hand, where a pre-existing relationship does not exist, actual suitability and sophistication of offerees does not appear to be enough. In *Webster Management Assured Return Equity Management Group Trust*,[316] the SEC indicated that general solicitation could be found if investment trust units were to be offered to purchasers without a pre-existing relationship to the investment trust, its managers or offering agents, despite the fact that the minimum investment in the units was $250,000 and units could only be sold to certain qualifying employee benefit trusts.

The type of pre-existing relationship required to ensure absence of general solicitation and advertising is one "that would enable the issuer (or a person acting on its behalf) to be aware of the financial circumstances or sophistication of the persons with whom the relationship exists or that otherwise are of some substance and duration."[317] Relationships involving prior investments and other business dealings are most likely to produce the required level of awareness. Social, family or employment relationships alone may be found to be of little value. Since start-up and smaller issuers do not have as many pre-existing substantive relationships as their larger competitors, the prohibition on general solicitation and advertising, as interpreted by the SEC, may impose a disproportionate impediment to small business capital formation.[318]

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[315] *See* Weprin v. Peterson, 736 F. Supp. 1124, 1126-27 (N.D. Ga. 1988) (holding that distributing offering memorandum to over 400 persons with pre-existing relationship did not constitute general solicitation); Johnston v. Bumba, 764 F. Supp. 1263, 1274-75 (N.D. Ill. 1991) (holding that distributing 2500 copies of offering memorandum without assurance of pre-existing relationship constituted general solicitation such that exemption was unavailable).

[316] SEC No-Action Letter, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,410, at 77,327 (Jan. 6, 1987).

[317] *Mineral Lands Research & Mktg. Corp.*, *supra* note 314, at *1.

[318] *See* HICKS, *supra* note 1, § 7.03[4][c][v] (discussing criticism of pre-existing relationship requirement in ABA letters to SEC).

Absent a pre-existing relationship, even selective solicitations directed at limited and defined classes of offerees have generally been prohibited. For example, the SEC refused concurring interpretive advice with respect to an advertising campaign by a limited partnership involving racehorses. The partnership proposed mailing brochures to members of a horse owners and breeders association, distributing brochures at a public sale and advertising in a trade journal.[319] The SEC also found general solicitation when an issuer sent offering materials to an unknown number of offerees which were drawn from one of the following lists: (1) participants in prior offerings by the same general partner; (2) corporate officers taken from annual reports of 50 "Fortune 500" companies; (3) other investors of more than $10,000 in real estate ventures; (4) physicians in the state of California; (5) managing engineers at Hughes Aircraft; and (6) presidents of companies listed in a New Jersey industrial directory.[320]

Sending offering materials in a mass mailing to brokers, accountants, lawyers and similar professionals, with whom no

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In light of burden of proof requirements, see *supra* note 14 and accompanying text, offering issuers must be concerned not only with complying with the general prohibition on general solicitation and advertising but also with documenting such compliance. One commentator has suggested the following procedures in an article written in the form of a letter to a client preparing for an exempt offering:

> Before the offering begins, you should establish internal procedures and checklists that make it easier for you to comply with the rules concerning the conduct of the offering and the information sent to, and received from, prospective investors. Only specifically designated persons should distribute the [Private Placement Memorandum], each copy of which should be numbered. Copies for internal use also should be numbered. A list of each person to whom the PPM is sent should be maintained and should indicate whether it is for internal use, bankers, purchaser representatives, lawyers, accountants, or specific investors. A file should be maintained for each potential investor containing accurate records of correspondence, meetings, phone calls, etc., to record what questions were asked, what additional material was provided, and what due diligence was performed to determine each investor's sophistication and accreditation.

Morgenstern, *supra* note 25, at 274.

[319] Aspen Grove, 1982 SEC No-Act. LEXIS 3136, at *1-2 (Dec. 8, 1982).

[320] In re Kenman Corp., SEC No-Action Letter, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,767, at 87,427-28 (Apr. 19, 1985).

pre-existing relationship exists, for redistribution to interested clients, will also typically constitute general solicitation, despite whatever judgment or discretion would be exercised in redistribution by the intermediary.[321] In *Pennsylvania Securities Commission*,[322] the SEC indicated that a mass mailing to brokers, investment advisers, accountants and lawyers with whom no pre-existing relationship existed may itself constitute a general solicitation despite the fact that the information stated it was for background and reference purposes only.

An issuer or broker-dealer may use directed forms of general solicitation to locate qualified offerees for future offerings if the issuer or broker-dealer is not then engaged in an offering or activities preparatory to such *future* offerings. Such a solicitation is also permissible even if the issuer or broker-dealer *is* then engaged in an offering, provided that the current offering is not made to persons located in the area of solicitation and such solicitation clearly relates only to subsequent unspecified offerings.[323]

The prohibition does not prevent a broker-dealer from using media advertising to attract *issuers* (as opposed to *investors*) as customers.[324] On the other hand, the SEC staff has indicated that a newspaper advertisement by a broker-dealer seeking fully structured offerings in which to participate (rather than issuer-customers for future unspecified offerings), may be found to constitute the first step in a public offering.[325]

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[321] *See, e.g.*, Johnston v. Bumba, 764 F. Supp. 1263, 1274 (N.D. Ill. 1991).

[322] 1990 SEC No-Act. LEXIS 45 (Jan. 16, 1990).

[323] *See* Arthur M. Borden, Sage Gray Todd & Sims, SEC No-Action Letter, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,344, at 88,597 (Aug. 15, 1977); *see also* ENI Corp., 1975 SEC No-Act. LEXIS 2438, at *2-3 (Dec. 3, 1975) (holding that investment-related "institutional advertising" did not constitute general solicitation). *But cf.* Damson Oil Corp., SEC No-Action Letter, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,916, at 84,358 (July 5, 1974) (questioning absence of general solicitation where oil and gas syndicator then in registration with public program proposed to place advertisement in airline in-flight brochure which did little more than identify oil company and made no reference to pending or future programs or securities); SEC v. Freeman, SEC No-Action Letter, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,361, at 93,243 (N.D. Ill. 1978) (holding that previous newspaper advertisements stating that "equity positions" were available created pattern of public solicitation that could destroy exemption claimed for subsequent offering).

[324] Borden & Ball, 1974 SEC No-Act. LEXIS 662, at *1 (Oct. 23, 1974).

A common marketing practice for broker-dealers is to mass mail generic advertising accompanied by questionnaires soliciting information regarding the financial condition and investment experience and preferences of recipients. An important area of interpretive inquiry for broker-dealers acting as best-efforts sales agents of Regulation D offerings is whether customers originally contacted by such general solicitation methods may subsequently invest in Regulation D offerings without running afoul of Rule 502(c). The SEC staff has indicated that such a general solicitation will not taint an investor if the original solicitation was generic in nature (*i.e.*, not related to any particular offering), the broker-dealer implements procedures designed to insure that persons solicited are not offered any securities that were offered or contemplated for offering at the time of the solicitation, the broker-dealer subsequently develops a substantive relationship with the investor and a significant period of time passes between the original solicitation and the offering in question.[326] In order to establish a substantive relationship, it is not necessary for the customer to have actually invested with the broker-dealer.[327] In fact, the SEC staff has indicated that complete answers to a sufficiently comprehensive broker-dealer questionnaire could itself serve as the basis for a substantive relationship.[328]

Promoters, syndicators and broker-dealers have also sought interpretive advice regarding the effect under Rule 502(c) of advertising that is ostensibly unrelated to any particular

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[325] Barry Geller; Econative Corp., SEC No-Action Letter, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,539, at 80,187 (Jan. 25, 1978).

[326] *See* H.B. Shaine & Co., 1987 SEC No-Act. LEXIS 2004, at *1 (May 1, 1987); Bateman Eichler, Hill Richards, 1985 SEC No-Act. LEXIS 2918, at *1 (Dec. 3, 1985); E.F. Hutton & Co., SEC No-Action Letter, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,909, at 79,442 (Dec. 3, 1985).

[327] *See E. F. Hutton & Co., supra* note 326.

[328] *See H.B. Shaine & Co., supra* note 326; *cf. Bateman Eichler, Hill Richards, supra* note 326.

Regulation D offering. In theory, generic or "institutional" advertising[329] that does not have a bearing on, or relate to, a contemporaneous or subsequent Regulation D offering should not pose problems under the Rule 502(c) prohibition. The SEC has taken a very conservative approach in responding to inquiries seeking assurance that generic or "institutional" advertising campaigns or other mass communications were not in effect offering securities. In *Gerald F. Gerstenfeld*,[330] a syndicator proposed to run a generic advertisement which mentioned no particular offering, but which indicated that he sold securities in exempt transactions and invited the public to call or write for additional information. The SEC staff concluded that such an advertisement could clearly be viewed as making an offer in violation of Rule 502(c) where the syndicator was simultaneously carrying out offerings in reliance on Regulation D. The staff went on to indicate that "because the primary purpose of the advertisement is to sell securities and to condition the market for future sales, the advertisement would constitute an offer even at a time when securities are not being sold if the syndicator expects in the near future to offer and sell securities."[331]

In *Alma Securities Corp.*,[332] the SEC staff found that a tombstone advertisement by an issuer or broker-dealer announcing completion of one offering could be deemed an indirect general solicitation for a subsequent offering.

Even an advertising campaign for the issuer's products may, under certain circumstances, condition the market for its securities sufficiently to amount to general solicitation and advertising in violation of Rule 502(c).[333]

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[329] "This type of advertisement glorifies the syndicator as a business entity but does not attempt to promote any particular offering of that sponsor." HICKS, *supra* note 1, § 7.03[4][c][iii][C].

[330] 1985 SEC No-Act. LEXIS 2790 (Dec. 3, 1985).

[331] *Id.*

[332] 1982 SEC No-Act. LEXIS 2647 (Aug. 2, 1982).

[333] *See* Printing Enterprises Management Science, Inc., SEC No-Action Letter, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,415, at 78,518 (Mar. 23, 1983).

b. Is the Communication Being Used by the Issuer or on the Issuer's Behalf?

It is not always clear whether a party is acting on behalf of the issuer. *Tax Investment Information Corp.*[334] involved publication of a newsletter analyzing private placement offerings. The publisher, who was independent of the issuers, proposed to compile and analyze data on private offerings and distribute information to subscribing accounting and law firms throughout the state. The SEC refused to agree that such a publication would be permitted under Regulation D due to its susceptibility to use by participants in an offering.[335]

A "finder" who receives a fee for contacting potential investors and briefing them on the nature of the offering (but not handing out disclosure documents) would still be acting for the issuer and must comply with the manner of offering limitations.[336]

5. Limitation on Resale

The fundamental purpose of the Securities Act is to prevent the public distribution of securities by an issuer or its affiliates without the investor protections afforded by the registration process and the prospectus delivery requirement.[337] In order to assure that securities sold in limited or nonpublic exempt offerings are not immediately resold in a secondary distribution that would indirectly accomplish what the Securities Act seeks to prohibit, the basic resale exemption under the Securities Act—section 4(1)—is unavailable to anyone who purchases such securities from an issuer or affiliate for purposes of, or with a view to, a public distribution.[338] A person buying for, or with a view to, such a deferred distribution for an issuer or affiliate is deemed an "underwriter" under section 2(11) of the Securities Act.[339]

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[334] SEC No-Action Letter, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,379, at 78,393-94 (Jan. 7, 1983).

[335] *See* Jack B. Straus, Jr. Esq., 1985 SEC No-Act. LEXIS 2454, at *1 (Aug. 20, 1985) (stating that effect of foreign newspaper advertisement might be solicitation of United States investors); Texas Investor Newsletter, SEC No-Act. LEXIS 1582, at *1 (Jan. 23, 1984) (stating that principal of issuer preparing and paying for material in newsletter constitutes general advertising). *But cf.* Nancy H. Blasberg, 1986 SEC. No-Act. LEXIS 2519 (July 12, 1986) (stating that guide containing limited information would not be considered to be general solicitation or general advertising); Merit Communications, Inc., 1987 SEC No-Act. LEXIS 2399, at *1 (Sept. 7, 1987) (ruling that mere filing of Form D is not general solicitation, but provision of additional information by issuer upon request may be general solicitation).

[336] Alaska Co., 1978 SEC No-Act. LEXIS 1967, at *1 (Oct. 10, 1978).

[337] *See* 1 LOSS & SELIGMAN, *supra* note 1, at 380-394.

To make this structure for preventing deferred distribution work, the courts and the SEC have imposed on issuers an obligation to exercise "reasonable care" to assure that purchasers in a limited or nonpublic exempt offering are not "underwriters" within the meaning of section 2(11) of the Securities Act.[340]

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[338] Section 4(1) of the Securities Act exempts "transactions by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77d(1) (1988). The basic purpose of the § 4(1) exemption is to separate ordinary trading in the public markets (which was not intended to be covered by the § 5 registration requirement) from public offerings into those markets (which are the focus of the registration requirement); *see* 3 LOSS & SELIGMAN, *supra* note 1, at 1454-60.

[339] Section 2(11) of the Securities Act defines "underwriter" as:

> any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

15 U.S.C. § 77b(11) (1988).

For discussion of the underwriter definition and its place in the overall architecture of the Securities Act, see 2 LOSS & SELIGMAN, *supra* note 1, at 1108-1134; 3 LOSS & SELIGMAN, *supra* note 1, at 1454-1460, 1474-1502.

[340] *See* 17 C.F.R. § 230.502(d) (1993) (stating that "[t]he issuer shall exercise reasonable care to assure that the purchasers of the securities are not underwriters within the meaning of § 2(11) of the Act."). The requirement is an essential element of the § 4(2) private placement exemption. *See* SEC v. Continental Tobacco Co., 463 F.2d 137, 159 (5th Cir. 1972); United States v. Hill, 298 F. Supp. 1221, 1230 (D. Conn. 1969); SEC v. North American Research & Development Corp., 280 F. Supp. 106, 123 (S.D.N.Y. 1968); United States v. Custer Channel Wing Corp., 247 F. Supp. 481, 489-90 (D. Md. 1965), *aff'd* 376 F. 2d 63 (4th Cir. 1967), *cert. denied*, 389 U.S. 850 (1968); D.F. Bernheimer & Co., 41 SEC 358, 363 (1963); Advanced Research Assocs., 41 SEC 579,

Rule 502(d) conditions availability of the Rule 505 and Rule 506 exemptions on the issuer's exercise of such "reasonable care."[341] The 1992 Small Business Initiatives eliminated this condition from Rule 504. Rule 502(d) provides that "reasonable care" may be demonstrated by the following:

(1) Reasonable inquiry to determine if the purchaser is acquiring the securities for himself or another person.[342] This is the basis for requiring an "investment letter" or "representation of investment intent" from each purchaser stating that his purchase is for investment and not with a view to resale.[343]

588, 590 (1963); Securities Act Release No. 4552, 1 Fed. Sec. L. Rep. (CCH) ¶ 2777, at 2930 (Nov. 6, 1962);

Loss and Seligman explain the requirement as follows:

> There is a "second stage" to the private placement exemption in § 4(2). That is to say, on the assumption that the number of initial offerees and all the other relevant factors are such as to justify the conclusion the first stage of the transaction does not involve a public offering, it is still necessary to consider whether the purchasers' intent is to take for resale. If so, obviously, it is the number and type of *ultimate* offerees that are significant; otherwise a distribution by means of a sale to two or three firm-commitment underwriters for distribution would be a private offering.
>
> The purchaser's intent is a question of fact on which his own statement is evidentiary. Hence, it was traditional for the issuer — or the seller in a control relationship with the issuer who was proceeding on the assumption that his buyers would not be "underwriters" so as to destroy the exemption under § 4(1) — to request "investment letters" from the buyers. These letters became in practice an integral feature of private offerings.

3 LOSS & SELIGMAN, *supra* note 1, at 1474-77.

[341] Restrictions on resale (to ensure that purchasers were not "underwriters") were a feature of the predecessors to all the Regulation D exemptions. *See* 17 C.F.R. § 230.146, .240 & .242 (rescinded 1982). Since Rule 506 is a safe harbor enacted pursuant to the § 4(2) private placement exemption, the SEC was bound to include this key element of the statutory exemption as a condition. *See supra* note 312. The SEC was not similarly limited in its rulemaking under § 3(b) of the Securities Act, as exhibited by the SEC's elimination of resale restrictions altogether from Rule 504 in the Small Business Initiatives. *Id.*

[342] 17 C.F.R. § 230.502(d)(1) (1993).

[343] *See supra* note 340. The representation of investment intent is usually included in the subscription agreement or purchase agreement used to embody the contractual obligation to purchase and signed by the investor. A typical representation might provide as follows:

> The securities being acquired by the Investor hereunder are being purchased for the Investor's own account and not with a view to, or for resale in connection with, any distribution or public offering thereof in violation of the

(2) Written disclosure to each purchaser prior to the sale that the resale of the securities is restricted, and the securities cannot be resold unless they are registered under the Securities Act or an exemption from registration is available.[344]

(3) Placement of a legend on the certificate or other document evidencing the securities and referring to the absence of Securities Act registration and restrictions on resale.[345]

Prior to the 1989 amendments, issuers were required to obtain representations of investment intent, provide written disclosure of the restrictions on resale imposed by the Securities Act and place a restrictive legend on certificates representing the securities in order to establish "reasonable care."[346] Such actions are no longer mandatory in order to preserve the availability of a Regulation D exemption. Other actions by an

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> Securities Act of 1933. The Investor understands that the securities have not been registered under the Securities Act by reason of their contemplated issuance in transactions exempt from the registration and prospectus delivery requirements of the Securities Act and that the securities may not be resold unless they are registered under the Securities Act or an exemption from registration is available. The Investor further represents that it is fully informed as to the applicable limitations upon any distribution or resale of the securities under the Securities Act and agrees not to distribute or resell any of the securities if such distribution or resale would constitute a violation of the Securities Act.

[344] For institutional and other sophisticated investors, the representation of investment intent contained in the subscription agreement or purchase agreement may be sufficient "written disclosure." *See supra* note 343. Rule 502(b)(vii) explicitly requires disclosure of resale limitations to nonaccredited purchasers. 17 C.F.R.§ 230.502(b)(vii) (1993). *See supra* note 262 and accompanying text. Where nonaccredited and otherwise less sophisticated investors purchase, a somewhat more extensive explanation of the restrictions is typically contained in the private placement memorandum or other disclosure document.

[345] A typical restrictive legend might read as follows:

> The securities evidenced hereby have not been registered under the Securities Act of 1933 and may not be sold, transferred, assigned, pledged or otherwise distributed for value unless there is an effective registration statement under such Act covering such securities or the Company receives an opinion of counsel for the holder of these securities (satisfactory to counsel for the Company) stating that such sale, transfer, assignment, pledge or distribution is exempt from the registration and prospectus delivery requirements of such Act.

[346] *See* 1989 Amendment Release, *supra* note 43, at 80,048.

issuer may also demonstrate "reasonable care" and thus satisfy the requirement.[347]

a. *Public Resale—Rule 144*

Securities sold pursuant to the Rule 505 and Rule 506 exemptions are "restricted securities" as defined in Rule 144 under the Securities Act.[348] Rule 144 provides a safe harbor under section 4(1) exemption permitting resale of restricted securities following a two-year holding period if the holder complies with conditions relating to availability of current public information about the issuer, the manner of sale, volume limitations and filing of a notice of sale with the SEC.[349] Following completion of a three-year holding period, holders other than affiliates (officers, directors or significant shareholders) of the issuer may generally resell restricted securities under Rule 144 without compliance with the other requirements.[350] As a practical matter, restricted securities may be resold into the public market under section 4(1) only by compliance with the Rule 144 safe harbor.[351]

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[347] *But see supra* note 262 (stating that written disclosure under Rule 502(d)(2) is still mandatory under Rule 502(b)(2)(vii)).

[348] Rule 144(a)(3) defines "restricted securities" to include:

> (i) securities that are acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering; or
>
> (ii) securities acquired from the issuer that are subject to the resale limitations of [Regulation D] or [Rule 701] under the Act; or
>
> (iii) securities that are subject to the resale limitations of Regulation D and acquired in a transaction or chain of transactions not involving any public offering; or
>
> (iv) securities that are acquired in a transaction or chain of transactions meeting the requirements of [Rule 144A].

17 C.F.R. § 230.144(a)(3) (1993).

[349] *Id.* § 230.144. A comprehensive treatment of resale exemptions under the Securities Act, including the statutory exemption in § 4(1) and Rules 144 and 144A, is beyond the scope of this article. One of the most significant texts on the topic is J. WILLIAM HICKS, RESALES OF RESTRICTED SECURITIES (rev. ed. 1993), which covers both Rule 144 and Rule 144A; *see also* 3 LOSS & SELIGMAN, *supra* note 1, at 1474-1575; James H. Fogelson, *Rule 144—A Summary Review*, 37 BUS. LAW. 1519 (1982), *reprinted in revised and updated form in* JENNINGS, ET AL., *supra* note 1, at 492-507.

[350] The Rule 144 definition of "affiliate" is the same as the definition under Regulation D. *See supra* note 194 and accompanying text. For background on the essential, but difficult and ambiguous, concept of "control" as used in the affiliate definition, see 4 LOSS & SELIGMAN, *supra* note 1, at 1691-1727; Rutheford B. Campbell,

In 1990, the SEC amended Rule 144 to change the holding period requirement for resale of restricted securities.[352] Prior to the revision, holding periods were generally measured from the point of acquisition by the holder seeking to resell in reliance on Rule 144. Consequently, an exempt private transfer from one holder to another started a new holding period. This method of measuring the holding period was subject to certain "tacking" rules which permitted, in some circumstances (*e.g.*, gifts), a transferee to add the transferor's holding period to his own for purposes of Rule 144.[353] The old holding period provisions were also subject to certain "tolling" rules which suspended running of the period during times at which the holder had limited risk of ownership through put options or short positions.[354]

As revised, the Rule 144 holding period begins on the date of issuance or the date of last sale by an affiliate, whichever is later. Exempt private transfers between nonaffiliates, therefore, do not trigger commencement of a new holding period. The "tacking" rules are not needed and have been eliminated except with respect to transfers by affiliates. The amendment

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Jr., *Defining Control in Secondary Distributions*, 18 B.C. IND. & COMM. L. REV. 37 (1976); A. A. Sommer, Jr., *Who's "In Control"?—SEC*, 21 BUS. LAW. 559 (1966).

Following completion of the three-year holding period, restricted securities held by nonaffiliates may be resold publicly or privately under § 4(1) without any further conditions. Since resale of such securities (sometimes referred to as "Rule 144(k) securities" or simply "K" securities) can no longer jeopardize the exemption pursuant to which such securities were originally issued, most issuers will permit removal of restrictive legends from certificates. *See* HICKS, *supra* note 349, at 470-71.

[351] *See* Rule 144(j); 17 C.F.R. § 230.144(j) (1933). Although the rule explicitly states that it is a nonexclusive safe harbor, the SEC has warned that sellers of restricted securities operating outside Rule 144 "will have a *substantial burden of proof*" and "do so at their risk." *See* Securities Act Release No. 5223, [1971-1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,487, at 81,050 (Jan. 11, 1972) (emphasis added); *see also* HICKS, *supra* note 349, at 452-58.

[352] *See* Securities Act Release No. 6862, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,523, at 80,637-61 (Apr. 23, 1990) [hereinafter Rule 144A Adopting Release].

[353] *Id.* at 80,649-51.

[354] *Id.*

also eliminated the "tolling" rules as a further liberalization of the requirement.[355]

b. Private Resale—Rule 144A and "Section 4(1½)"

Restricted securities may also be resold under section 4(1) into the institutional market or in other nonpublic transactions. Rule 144A, which was adopted by the SEC in April 1990, creates a safe harbor under section 4(1) for resale of certain restricted securities to "qualified institutional buyers."[356] Qualified institutional buyers ("QIBs") are generally defined to include the same type of institutions as are included in the non-natural-person categories of the "accredited investor" definition[357] with the additional requirement that the institution must own and invest on a discretionary basis a minimum of $100,000,000 in securities of issuers which are not affiliated with it. Broker-dealers are required to have only $10,000,000 owned and invested. Banks and savings and loans must have not only $100,000,000 so owned and invested but must also have a $25,000,000 net worth. In October 1992, the SEC amended the QIB definition to: (i) include collective and master trusts, two legal forms commonly used for the collective investment of pension and other employee benefit plan funds; (ii) cover purchases by insurance companies for separate accounts not required to be registered under the Investment Company Act; and (iii) permit inclusion of U.S. government securities in calculating the amount of securities owned and invested.[358]

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[355] *Id.*; *see also* Jesse M. Brill, SEC No-Action Letter, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,463, at 77,380 (June 8, 1990) (giving revisions to Rule 144 holding period retroactive effect).

[356] 12 C.F.R. § 220.131(b) (1993); *see* Rule 144A Adopting Release, *supra* note 352.

[357] 17 C.F.R. § 230.144A(a)(1) (1993); *see supra* notes 137-52 and accompanying text.

[358] *See* Securities Act Release No. 6963, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,052, at 83,382-84 (Oct. 28, 1992). For further discussion of Rule 144A and its operation to date, see HICKS, *supra* note 349, at ch. 7; *Staff Report on Rule 144A*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,918, at 84,410-18 (Sept. 30, 1991); Edward F. Greene & Alan L. Beller, *Rule 144A: Keeping the U.S. Competitive in the International Financial Markets*, INSIGHTS, June 1990, at 3; Bernard J. Karol, *The Effects of Rule 144A*, 23 REV. SEC. & COMMODITIES REG. 125 (1990); Bevis Longstreth, William B. Beekman & Bruce A. Rich, *Rule 144A: A Closer Look*, INSIGHTS,

The section 4(1) exemption extends beyond the confines of the Rule 144A safe harbor to cover other resale transactions which do not constitute a "distribution" of securities and therefore do not involve an "underwriter."[359] The Securities Act does not define the term "distribution" as used in the section 2(11) definition of "underwriter." However, courts have indicated that a "distribution" in section 2(11) is tantamount to a "public offering" as used in section 4(2).[360] Resale transactions which bear the attributes of a section 4(2) private placement therefore are exempt from Securities Act registration under section 4(1).[361] This basis for exempt private resales has been nicknamed the "section 4(1½)" exemption by securities law pundits.[362]

6. *Notice of Sale Requirement*

Issuers are required to file five copies of the prescribed Notice of Sale on Form D no later than 15 days after the first sale of securities in a Regulation D offering.[363] Prior to the 1989 amendments, the timely filing of Form D was a condition to any exemption under Regulation D. After the 1989 amendments, filing Form D is still required, but it is not a condition. Failure to file will not result in loss of the exemption for the

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August 1990, at 16; Lawrence R. Seidman, *SEC Rule 144A: The Rule Heard Round the Globe—Or the Sounds of Silence?*, 47 BUS. LAW. 333 (1991).

[359] Rule 144A is intended as a truly nonexclusive safe harbor under § 4(1), providing objective guidance on the contours of only one type of exempt nonpublic transaction. *See* Rule 144A Adopting Release, *supra* note 352, at 80,639 (stating that "[t]he Commission wishes to emphasize that Rule 144A is not intended to preclude reliance on traditional facts-and-circumstances analysis to prove the availability of an exemption outside the safe harbor it provides").

[360] *See generally* Ackerberg v. Johnson, 892 F.2d 1328, 1335 n.6 (8th Cir. 1989); Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir. 1959), *cert. denied*, 361 U.S. 896 (1959); HICKS, *supra* note 349, at 476-509.

[361] HICKS, *supra* note 349 at 474-75.

[362] For discussion of the "§ 4(1½)" exemption, see HICKS, *supra* note 349, at ch. 6; Carl W. Schneider, *Section 4(1½) — Private Resales of Restricted or Control Securities*, 49 OHIO ST. L.J. 501 (1988); Study Group Report to the Comm. on Fed. Reg. of Securities, *The "Section 4(1½)" Phenomenon: Private Resales of "Restricted" Securities*, 34 BUS. LAW. 1961 (1979).

[363] 17 C.F.R. § 230.503(a) (1993).

offering then being carried out.[364] On its face, this change may appear to be a mere technicality. In practice, however, elimination of timely Form D filing as an absolute condition to availability of Regulation D was a change of tremendous importance. It not only eliminated a trap for the unwary, but also made the exemption potentially available to the uncounseled and untutored. As self-effectuating exemptions, Rules 504, 505 and 506 became available in any case in which an issuer had, *in fact,* complied with the substantive conditions of the rules, even where those involved were oblivious to the registration requirement and the exemptions.

In order to provide a continued incentive for the timely filing of Form D, the 1989 amendments included a new Rule 507 which disqualifies an issuer prospectively from the use of any Regulation D exemption if such issuer has become the subject of any court order, judgment or decree enjoining it for failure to file Form D.[365] The SEC has the authority to waive such disqualification upon a showing of good cause.[366]

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[364] *Id.* § 230.507; *see* 1989 Amendment Release, *supra* note 43, at 80,046.

[365] 17 C.F.R. § 230.507(a) (1993); *see* HICKS, *supra* note 1, § 7.08[2].

[366] The Form D requirement put in place in 1989 was identical to the Form 701 filing requirement that the SEC included in the new exemption it adopted in 1988 for transactions pursuant to compensatory plans or contracts. *See infra* notes 534-35 and accompanying text in *Financing a Small Business (Part II).* The Form 701 filing requirement, however, was contained in temporary Rules 702T and 703T which the SEC permitted to expire in March 1993, thus eliminating the Form 701 filing requirement completely. *Id.* While the SEC may view Form D as still providing valuable empirical data on Regulation D use, see Proposing Release, *supra* note 27, at 84,465, the primary reason the SEC has not jettisoned the filing altogether probably relates more to coordination with blue sky exemptions. The Uniform Limited Offering Exemption continues to require timely filing of a notice on Form D with the applicable state securities administrator as a condition to availability of the exemption. *See infra* notes 639-42 and accompanying text in *Financing a Small Business (Part II).* The Mississippi version of ULOE includes this Form D filing as an absolute condition. *Id.* There was no analogous reason to retain the Form 701 requirement.

Unlike most SEC filings,[367] which are deemed "filed" only upon receipt by the SEC, a notice on Form D is considered "filed" as of either: (1) the date of receipt at the SEC's principal office in Washington, D.C.; or (2) the date on which the notice is mailed by means of United States registered or certified mail to the SEC's principal office in Washington, D.C., if the notice is delivered to such office after the date on which it is required to be filed.[368]

Where funds are deposited in escrow prior to closing, the first "sale" for purposes of Regulation D is deemed to have occurred upon receipt of the first subscription agreement and deposit of related funds into the escrow. Therefore, the issuer should file its first Form D not later than 15 days after receipt and deposit of the subscription agreement and related funds.[369] Although the stakes involved in failing to file in a timely manner have been greatly reduced since the 1989 amendments, good practice still dictates filing the Form D at commencement of the offering. Since the requirement is to file *not later* than 15 days after the first sale, there is no reason to wait until the first sale occurs. Issuers and selling agents routinely forget to keep counsel advised of when they accept the first subscription.

A Form D may be signed on behalf of the issuer or by anyone duly authorized by the issuer, including the issuer's attorney.[370]

G. *Rule 508: Insignificant Deviations from a Term, Condition or Requirement of Regulation D*

Prior to the 1989 amendments, the availability of a Regulation D exemption was conditioned on strict compliance with all applicable Regulation D requirements. Commentators had argued that loss of the exemption was too harsh a penalty for minor, isolated noncompliance despite good faith and reasonable attempts to comply, especially if the deviations related to technical requirements not directly related to investor protection.[371] In response to such criticism, the SEC adopted Rule 508 which prevents certain insignificant deviations from causing loss of the exemption for the entire offering. The relief from strict compliance is very limited in scope. It is premised on good faith efforts to comply in all respects[372] and may be, for the most part, more theoretical than practical. A lax approach to compliance with all applicable terms, conditions and requirements of Regulation D remains as inadvisable after the 1989 amendments as it was before.

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[367] *See* 17 C.F.R. § 240.0-3(a) (1993) (stating that "[t]he date on which papers are actually received by the Commission shall be the date of filing thereof if all of the requirements with respect to the filing have been complied with, except that if the last day on which papers can be accepted as timely filed falls on a Saturday, Sunday or holiday, such papers may be filed on the first business day following").

[368] *Id.* § 230.503(e) (General Instructions).

[369] *See* Q & A Release, *supra* note 36, Question 82, at 2637-17.

[370] *See* Q & A Release, *supra* note 36, Question 92, at 2637-18.

Rule 508 provides that failure to comply with a term, condition or requirement of Regulation D "will not result in the loss of the exemption . . . for any offer or sale to a particular individual or entity if the person relying on the exemption" demonstrates that (a) the term, condition or requirement violated was not intended to protect the particular individual or entity involved, (b) the failure to comply was insignificant with respect to the offering as a whole and (c) a good faith and reasonable attempt was made by the issuer to comply with all applicable terms, conditions and requirements of Regulation D.[373] Rule 508 does not define "insignificant with respect to the offering as a whole," but provides that the conditions relating to the prohibition on general advertising and general solicitation, the dollar limitations of the exemptions and the limitation on the number of purchasers are deemed in every case to be significant to a Regulation D offering as a whole and, therefore, are not subject to the Rule 508 defense.[374]

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[371] *See generally* Carl W. Schneider, *A Substantial Compliance ("I&I") Defense and Other Changes Are Added to SEC Regulation D*, 44 BUS. LAW. 1207, 1207-08 (1989); Stanley Keller, *The Saga of a Substantial Compliance Defense*, INSIGHTS, Aug. 1989, at 11.

[372] As noted above, the 1989 amendments did away with Form D filing as an absolute condition to availability of Regulation D, thus making the Regulation D exemptions available to those who inadvertently comply in fact with all of the applicable requirements. *See supra* notes 364-65 and accompanying text. Those who inadvertently "rely" on a Regulation D exemption, however, cannot look to Rule 508 for relief if their compliance is anything less than perfect. Carl Schneider notes:

> In effect, there can be no such thing as inadvertent substantial compliance with Regulation D by a person unmindful of the requirements, in order to qualify for the protections of Rule 508. By contrast, many private sales of securities by private companies do in fact qualify inadvertently for the basic self-implementing statutory exemption contained in section 4(2) (or section 4(6) or section 3(a)(11)), even though no one involved with the transaction had given the slightest consideration to the requirements of the 1933 Act. . . .
>
> The prototypical circumstances to which Rule 508 should apply is where the issuer has adopted a reasonable plan to assure compliance, and some accidental or careless oversight occurred.

Schneider, *supra* note 371, at 1211 (footnotes omitted); *see also* HICKS, *supra* note 1, § 7.08[3][d].

While new Rule 508 may protect an issuer in a private action challenging the availability of a Regulation D exemption (*i.e.*, under section 12(1) of the Securities Act), it will not protect an issuer in an enforcement action brought by the SEC.[375]

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[373] 17 C.F.R. § 230.508(a) (1993).

[374] *Id.* For a cataloging of the terms, conditions and requirements of Regulation D that *are* subject to the substantial compliance rule, see HICKS, *supra* note 1, § 7.08[3][c][iii]. Exclusion of the prohibition on general solicitation and advertising and the limitations on dollar amount and number of purchasers may seem to leave some of the most difficult conditions subject to a harsh rule of absolute compliance. These conditions, however, are softened somewhat by the flexibility of their own terms. The prohibition on general solicitation, for example, is not an absolute bar on all solicitation. Limited solicitation is allowed, and the line between general and limited is far from clear. *See supra* notes 307-33 and accompanying text. In addition, the SEC emphasized, when it adopted Rule 508, that its idea of absolute compliance with the prohibition encompasses the situation in which an issuer has adopted a program of good faith limited solicitation, but made a harmless mistake:

> [T]he question of whether or not particular activities constitute a general solicitation must always be determined in the context of the particular facts and circumstances of each case. Thus, for example, if an offering is structured so that only persons with whom the issuer and its agents have had a prior relationship are solicited, the fact that one potential investor with whom there is no such prior relationship is called may not necessarily result in a general solicitation.

1989 Amendment Release, *supra* note 43, at 80,047 (footnote omitted).
The limitation on number of purchasers is cushioned by "reasonable belief" qualifications. The limitation on aggregate offering price also has several mitigating features. *See* HICKS, *supra* note 1, § 7.08[3][c][ii] (listing violations excluded from Rule 508); Schneider, *supra* note 371, at 1212-15 (same).

[375] Where Rule 508 applies, its effect is to avoid "loss of the exemption from the requirements of section 5 of the Act for any offer or sale to a particular individual or entity" with respect to whom the person relying sustains the necessary burden of

In conjunction with adopting new Rule 508, the SEC modified two existing Regulation D provisions to eliminate technical traps for the unwary. First, the 1989 amendments made timely filing of Form D by the issuer a requirement but not a condition to availability of any Regulation D exemption.[376] Second, the 1989 amendments revised the provisions requiring an issuer to exercise "reasonable care" to prevent subsequent public distribution of securities by obtaining representations of investment intent, providing written disclosure of the restrictions on resale imposed by the Securities Act and placing a legend on certificates representing the securities.[377] Under amended Rule 502(d), such actions will establish "reasonable care" but are no longer mandatory to preserve the availability of a Regulation D exemption.[378]

The 1989 amendments also modified the information delivery requirements of Regulation D so that a Rule 505 or Rule 506 exemption is not lost by failure to deliver prescribed disclosures to any purchaser who is an accredited investor, even when nonaccredited purchasers are buying in the offering.[379] Prior to the 1989 amendments, an issuer was required to deliver the disclosure prescribed by Rule 502(b) in any offering

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proving the items in Rule 508(a)(1), (2) and (3). An issuer might be able to sustain the burden of proof with respect to some, but not all investors. An investor uniquely affected by the insignificant deviation would not be deprived of a rescission action by Rule 508. *See* Schneider, *supra* note 371 at 1211 n.15 (stating that "[e]ven if the safe harbor does not apply, a defendant would still be free to argue to a court that no plaintiff should have the right to play the market and then seek the essentially equitable remedy of rescission by capitalizing on an immaterial defect. Principles of waiver, laches, and estoppel may also be invoked.").

Rule 508(b) explicitly provides that a "failure to comply shall nonetheless be actionable by the Commission under section 20 of the Act." 17 C.F.R. § 230.508(b) (1993). The rule says nothing about the possible effect of Rule 508 on other types of actions which may result from violation of § 5, such as cease-and-desist or disciplinary actions by the SEC or criminal prosecutions by the Justice Department. *See* Schneider, *supra* note 371, at 1212; *see also supra* notes 4-9 and accompanying text (discussing types of action which may result from violation of § 5 of Securities Act).

[376] *See supra* notes 363-66 and accompanying text; Schneider, *supra* note 371, at 1215-16.

[377] *See supra* notes 341-47 and accompanying text.

[378] *See* Schneider, *supra* note 371, at 1216.

[379] *See supra* notes 200-02 and accompanying text.

made pursuant to Rule 505 or Rule 506 to *all* purchasers (including accredited investors) if *any* nonaccredited investor was a purchaser. Under the amended provision, delivery of prescribed disclosure to an accredited investor is never a condition to the exemption.[380]

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Part II of this article, containing Section III (Other Principal Securities Act Exemptions) and Section IV (Mississippi Blue Sky Exemptions for Financing a Small Business), will be published at 63 MISS. L.J. 267 (1994).

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[380] *See* Schneider, *supra* note 371, at 1217.

COMMENT

SPOLIATION OF EVIDENCE: WHY MISSISSIPPI SHOULD ADOPT THE TORT

I. INTRODUCTION

Spoliation occurs when pivotal evidence is destroyed or tampered with, thereby interfering with a party's recovery in a civil action.[1] The spoliation of evidence poses serious dilemmas for courts and parties involved in pending or expected civil litigation.[2] The destruction of evidence creates difficulty for a party in proving his case and obstructs the courts' administration of justice.[3] Although the common law did not recognize an independent tort cause of action,[4] beginning as early as 1722 in the case of *Armory v. Delamirie*,[5] courts have taken steps to prevent the spoliation of evidence.[6]

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[1] Thomas G. Fischer, Annotation, *Intentional Spoliation of Evidence, Interfering with Prospective Civil Action, As Actionable*, 70 A.L.R. 4th 984, 985 (1989). The prospective civil action may be against the spoliator or a third person. *Id.*

[2] Andrea H. Rowse, Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 191 (1985). The intentional destruction of evidence causes serious legal problems. *Id.*; *see* Philip A. Lionberger, Comment, *Interference With Prospective Civil Litigation by Spoliation of Evidence: Should Texas Adopt a New Tort?*, 21 ST. MARY'S L.J. 209, 209 (1989) (explaining that spoliation of evidence creates difficulties in both proving and defending cause of action).

[3] Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1138 (1987). The destruction of evidence impedes reaching the two most important goals in the judicial system, which are truth and fairness. *Id.* Restricting the destruction of evidence is justified because destruction decreases the chances that the judicial process will reach accurate results. *Id.*

[4] Nancy Melgaard, Note, *Spoliation of Evidence-An Independent Tort?*, 67 N.D. L. REV. 501, 502 (1991). The belief that spoliation of evidence should not be tolerated dates as far back as the early 1700's. *Id.* However, the idea that spoliation ranks as an independent tort is fairly new. *Id.*

The tort of spoliation of evidence is based on the notion that spoliation constitutes "wrongful interference with a plaintiff's 'probable expectancy' of prevailing in a civil action."[7] A "probable expectancy" is a person's logical belief that he will profit from an occurrence which he reasonably expects will take place.[8] The spoliation tort stemmed from the common law tort of intentional interference with prospective business advantage and the courts' efforts to protect the "probable expectancies" of the plaintiff.[9] The tort developed as a result of criticism that traditional remedies, such as criminal sanctions, discovery sanctions, and the spoliation inference, do not adequately protect wronged litigants.[10] A primary contention in this area is the possibility that inadequate penalties may induce a person to destroy evidence rather than allow that evidence to be used against him.[11]

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[5] 93 Eng. Rep. 664 (K.B. 1722).

[6] *Armory*, 93 Eng. Rep. at 664. In this case, the court refused to tolerate the spoliation of a jewel, and allowed the plaintiff to bring an action in trover against the jeweler. *Id.* The judge instructed the jury that unless the defendant produced the jewel and proved it was a low quality gem, the jury should presume the jewel to be of the finest quality and determine damages accordingly. *Id.*

[7] James F. Thompson, Comment, *Spoliation of Evidence: A Troubling New Tort*, 37 KAN. L. REV. 563, 563 (1989) (quoting Smith v. Superior Court, 198 Cal. Rptr. 829, 837 (Cal. Ct. App. 1984)). The tort may be grounded in either negligence or intent. *Id.* The plaintiff may possibly recover very high damages for his expectancy, including any additional expenses incurred in proving the underlying case and the amount of damages the plaintiff may have possibly won at trial if the evidence had been available. *Id.* at 563-64.

[8] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 130, at 950 (4th ed. 1971). Much of what an individual values depends upon "probable expectancies" and the courts must protect these expectancies from unnecessary interference. *Id.*

[9] County of Solano v. Delancy, 264 Cal. Rptr. 721, 728 (Cal. Ct. App. 1989). In relying on the decision in Smith v. Superior Court, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984), the *Delancy* court recognized that the *Smith* court inadvertently relied on the tort of intentional interference with prospective business advantage in justifying the spoliation tort and compared the plaintiff's "opportunity to win" a lawsuit to the "reasonable probability" that a profit or contractual relationship would have resulted. *Id.* Based on this comparison, the court concluded that a potential civil action is a "valuable probable expectancy" that the court must protect. *Id.*

[10] Theresa M. Owens, *Should Iowa Adopt the Tort of Intentional Spoliation of Evidence in Civil Litigation?*, 41 DRAKE L. REV. 179, 180 (1992). Those favoring adoption of the tort argue that criminal sanctions, discovery sanctions, and the spoliation inference do not completely protect a potential litigant from spoliation because of their limited application. *Id.* Likewise, these measures fail to compensate

The spoliation of evidence is a tort of interference with legal rights.[12] When a court adopts the tort, it is recognizing that the right to bring a lawsuit is a legally protected interest.[13]

II. TRADITIONAL REMEDIES RECOGNIZED UNDER MISSISSIPPI LAW

A. *Criminal Sanctions*

Mississippi courts may impose criminal sanctions for the obstruction of justice under section 97-9-55 of the Mississippi Code.[14] This remedy is available regardless of whether the spoliation resulted from the act of a party to the pending litigation or a third party. Under the Mississippi statute, the obstruction of justice is a felony, while in most states it is a misdemeanor.[15] While the possibility of serving a two year sentence in the state penitentiary may provide a strong deterrent for potential spoliators, criminal prosecutors rarely

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the victim and punish the spoliator. *Id.*

[11] Rowse, *supra* note 2, at 191. Under the present laws, one may try to gain an advantage by destroying the incriminating evidence and risk imposition of legal penalties rather than allowing admission of the evidence at trial. *Id.* The inadequate remedies to deter this type of conduct may actually promote spoliation. *Id.*

[12] W. PAGE KEETON ET AL., PROSSOR & KEETON ON THE LAW OF TORTS § 1, at 6 (5th ed. 1984). Prosser and Keeton explained that "[t]he common thread woven into all torts is the idea of unreasonable interference with the interests of others." *Id.*

[13] Thompson, *supra* note 7, at 577. Courts which recognize a spoliation tort impliedly acknowledge a legally protectable right in the ability to file a cause of action. *Id.* Plaintiffs in a spoliation suit claim this interest was injured because their ability to litigate effectively has been impaired by the spoliation. *Id.*

[14] MISS. CODE ANN. § 97-9-55 (1972). "If any person or persons by threats, force or abuse, attempt to . . . obstruct or impede the administration of justice in any court, he shall, upon conviction be punished by imprisonment not . . . more than two (2) years in the state penitentiary." *Id.*

[15] Owens, *supra* note 10, at 188. Many state statutes classify spoliation of evidence as a misdemeanor. *Id.* Therefore, the penalty imposed may be minor when compared to the possibility of a judgment against the spoliator. *Id.*

utilize this sanction, as evidenced by the lack of criminal convictions resulting from civil violations.[16] This failure to take action renders the threat of criminal prosecution for spoliation in a civil lawsuit ineffective. Likewise, the deterrence provided by criminal sanction fails to compensate the victim in the civil lawsuit.[17] Even if the spoliator is prosecuted and convicted under the statute, the injured party is still without a remedy for the original injury. Moreover, the gain the spoliator may receive by the destruction of evidence may outweigh any penalty set forth in the statute.

B. Discovery Sanctions

Mississippi courts also have the power to deal with the spoliation of evidence by implementing discovery sanctions under Rule 37 of the Mississippi Rules of Civil Procedure.[18] The rule provides for sanctions only when a party to the litigation spoliates evidence. In the case of spoliation by a third party, these sanctions are unavailable and a separate cause of action for spoliation may be necessary. However, courts have great discretion in issuing sanctions to handle specific problems which arise in the discovery process of civil litigation.[19] Rule 37(e) gives the trial court the power to "impose upon any party or counsel such sanctions as may be just . . . ."[20] However, as discussed below, loopholes are inherent in the rule which leave the interests of injured parties unprotected.

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[16] Solum & Marzen, *supra* note 3, at 1106. Solum & Marzen explained that their "research revealed no criminal convictions for destroying evidence in civil litigation." *Id.*

[17] Lionberger, *supra* note 2, at 226. Deterrence is an important public policy consideration; however, penalties imposed on the spoliator do not compensate the plaintiff who cannot prove his case because the defendant destroyed the evidence. *Id.*; *see* Smith v. Superior Court, 198 Cal. Rptr. 829, 834 (Cal. Ct. App. 1984) (explaining that criminal prosecution does not address compensation of injured party).

[18] MISS. R. CIV. P. 37. Rule 37 empowers courts with the right to sanction litigants for the "[f]ailure to make or cooperate in discovery." *Id.*

[19] Cunningham v. Mitchell, 549 So. 2d 955, 958 (Miss. 1989). The Mississippi Supreme Court explained that the trial court is empowered with "additional flexibility" to sanction abuses. *Id.*; *see* William T. Thompson Co. v. General Nutrition Corp., 104 F.R.D. 119, 122 (C.D. Cal. 1985) (holding discovery sanctions are appropriate when litigant destroys evidence); Solum & Marzen, *supra* note 3, at 1094-1100 (explaining that discovery sanctions are applicable to destruction of evidence).

Advocates of the spoliation tort note that courts cannot impose discovery sanctions on a spoliator unless destruction of the evidence violates a court order.[21] Therefore, a party may circumvent punishment by destroying the evidence before a discovery order is requested.[22] However, in dealing with this problem, courts have utilized the doctrine of inherent power to justify the imposition of discovery sanctions in cases where evidence is destroyed before a court order has been issued.[23] Courts view the doctrine as being expansive, thereby justifying imposition of discovery sanctions.[24] Adoption of the tort would eliminate reliance on the doctrine of inherent power because it would eliminate the gap in discovery sanctions by punishing a spoliator regardless of whether the court had issued an order at the time of destruction.

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[20] MISS. R. CIV. P. 37(e). Rule 37(e) does not limit the available sanctions by specifically enumerating them, and thus allows the court to fashion appropriate sanctions as necessary. MISS. R. CIV. P. 37 cmt.

[21] Solum & Marzen, *supra* note 3, at 1094. The court's power is dependent on the prior existence of an order. *Id.*; *see* Barker v. Bledsoe, 85 F.R.D. 545, 547-48 (W.D. Okla. 1979) (protecting rights of party injured by pre-discovery spoliation by implementing discovery sanctions after plaintiff filed lawsuit); Depuy, Inc. v. Eckes, 427 So. 2d 306, 307 (Fla. Dist. Ct. App. 1983) (recognizing courts usually impose sanctions after formal suit has been commenced). *But see* Alliance to End Repression v. Rochford, 75 F.R.D. 438, 440 (N.D. Ill. 1976) (sanctioning defendant even though documents were destroyed before lawsuit).

[22] Lionberger, *supra* note 2, at 227-28. A litigant can avoid sanctions by destroying the damaging evidence before the opposing party files a discovery request. *Id.* If a person destroys evidence before a party requests a discovery order, he will not be able to comply with a request once it is made; therefore, the court may have little power to punish him for noncompliance. Pati Jo Pofahl, Comment, Smith v. Superior Court: *A New Tort of Intentional Spoliation of Evidence*, 69 MINN. L. REV. 961, 979 (1985).

[23] Solum & Marzen, *supra* note 3, at 1095-96. Many lower courts have relied upon the doctrine of inherent power and sanctioned parties that have destroyed evidence. *Id.* at 1095.

[24] *Id.* at 1095-96. Even though the United States Supreme Court stressed that inherent powers "must be exercised with restraint and discretion," numerous federal courts have relied on the doctrine to impose discovery sanctions. *Id.* (quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980)).

Those opposing adoption of the tort emphasize that courts can impose harsh sanctions on spoliators by rendering a default judgment.[25] This possibility makes discovery sanctions the most beneficial remedy currently available because it compensates the non-offending party by allowing him to win the lawsuit.[26] This is the only sanction which assures that the injured party is adequately compensated; however, this measure is only available when a party to the lawsuit spoliates evidence.

C. Spoliation Inference

In the 1992 case of *DeLaughter v. Lawrence County Hospital*,[27] the Mississippi Supreme Court adopted the "spoliation inference."[28] This inference entitles the jury to an instruction that they may infer that evidence is unfavorable to a certain party, *but only* if they first determine that the party either negligently or intentionally destroyed the evidence.[29]

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[25] Lionberger, *supra* note 2, at 227. The sanction of entering a default judgment against the offending party is available to the court. *Id.*; *see* Woodruff v. Cook, 721 S.W.2d 865, 869-71 (Tex. Ct. App. 1986) (granting default judgment for abuse of discovery).

[26] Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472, 486 (S.D. Fla. 1984). The court held that a default judgment was the only way to adequately compensate the plaintiff when the defendant's spoliation of evidence destroyed the plaintiff's right to have judgment rendered on the merits of the case. *Id.*; *see* Pofahl, *supra* note 22, at 979 (explaining that default judgment compensated plaintiff, because plaintiff had won lawsuit); Rowse, *supra* note 2, at 207 (explaining that only default judgment compensated plaintiff).

[27] 601 So. 2d 818 (Miss. 1992).

[28] *DeLaughter*, 601 So. 2d at 821-22. Robbie DeLaughter filed suit against Lawrence County Hospital and alleged the wrongful death of her mother resulted from the hospital's "failure to diagnose and negligence in the destruction of her hospital records." *Id.* at 820. The jury returned a verdict in favor of the hospital. *Id.* The trial court overruled DeLaughter's motion for a new trial and she appealed. *Id.* The Mississippi Supreme Court reversed and held that DeLaughter was entitled to a jury instruction that would permit the jury to "infer" that the medical records contained information unfavorable to the hospital if they determined the loss of the records was intentional or negligent. *Id.* at 822.

[29] *Id.* The spoliation inference permits the jury to make a determination of the spoliator's intent, and if the destruction did in fact take place, the jury can infer the missing evidence would be damaging to the spoliator's case. *Id.*; *see* Miller v. Montgomery County, 494 A.2d 761, 768 (Md. Ct. Spec. App. 1985) (holding spoliation tort was unnecessary because spoliation inference was appropriate remedy). *See*

The inference permits the jury to draw conclusions while all the evidence is presented, thereby preventing unnecessary relitigation of what the spoliated evidence would have proven.[30] Utilization of the spoliation inference in the underlying suit also makes the assessment of damages less complicated and speculative than trying to determine damages at a later trial for the tort of intentional spoliation.[31] The spoliation inference is generally limited to the litigants in the case;[32] therefore, there is no line of redress against a third party who spoliates evidence affecting the plaintiff's chances of recovery. Thus, the inference may be inadequate to protect the interests of the parties, whereas the spoliation tort would insure such interests are protected.[33] Likewise, the inference may not provide a sufficient remedy to the injured party because of the inability to build a case around an inference.[34]

However, even under a "spoliation inference," the courts could instruct the jury that it may "presume" the evidence was unfavorable to the spoliating party, especially in cases where the spoliation appears to be intentional or reckless. For example, some courts have held that the doctrine of res ipsa loquitur carries with it a presumption in which the defendant risks the entry of a directed verdict if he fails to sufficiently

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generally Solum & Marzen, *supra* note 3, at 1091 (explaining that courts which apply such inference place burden of proof on party requesting inference).

[30] Thompson, *supra* note 7, at 595. Endless litigation is not a threat under the spoliation inference because the issue of spoliation is decided with the underlying cause of action. *Id.* Adopting the tort of spoliation could result in a new cause of action being brought when a plaintiff loses a lawsuit because often there exists evidence that was unavailable at the trial. *Id.* at 592.

[31] *Id.* at 595. The spoliation inference reduces the speculative nature of damages and eliminates the guesswork involved in the spoliation tort. *Id.*

[32] *Id.* If a third party destroys evidence to harm the plaintiff's case, the spoliation tort may be necessary. *Id.* However, the court should consider the fairness of penalizing a party for a nonparty's actions. *Id.*

[33] 2 JOHN H. WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW § 277, at 133 (1979). An attempt to put into evidence the conduct of a third person can be paralleled to an attempt to admit hearsay. *Id.* However, evidence of conduct of parties to the case is admissible as an admission. *Id.*

[34] Thompson, *supra* note 7, at 575. A victim cannot build a strong case on only the presumption allowed for by the inference. *Id.*

rebut the presumption.[35] A presumption allows the jury to "presume," rather than merely "infer," that the spoliated evidence was unfavorable to the offending party who fails to rebut the presumption; therefore, a "spoliation presumption" presents a stronger remedy. A presumption would also eliminate the problems of endless litigation and speculative damages associated with the tort of spoliation since the injured party is compensated in the underlying suit.

III. SPOLIATION BY A PARTY TO THE PENDING LITIGATION

In 1986, the Alaska Supreme Court adopted the intentional spoliation tort in *Hazen v. Municipality of Anchorage*.[36] This case involved an altered arrest tape.[37] On appeal, the Alaska Supreme Court held that the plaintiff's prospective causes of action were "valuable probable expectancies," and the alleged alteration of the tape constituted an unreasonable interference with the expectancies.[38] However, since the plaintiff's false arrest suit was against the municipality and the officer who altered the arrest tape, the court could have utilized one of the traditional remedies to compensate her. For example, the court could have instructed the jury to "presume" that the altered arrest tape contained information unfavorable to the officer.

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[35] W. PAGE KEETON ET AL., HANDBOOK OF THE LAW ON TORTS § 40, at 258 (5th ed. 1984). A variety of courts have given res ipsa loquitur a greater effect than a permissible inference. *Id.* Some courts have held that the presumption associated with the doctrine of res ipsa loquitur shifts the ultimate burden of proof to the defendant. *Id.* This burden requires the defendant to introduce evidence that outweighs that of the plaintiff. *Id.*

[36] 718 P.2d 456 (Alaska 1986).

[37] *Hazen*, 718 P.2d at 458. An undercover vice officer charged Hazen with prostitution after he taped an alleged offer for sex on a hidden recorder. *Id.* The court dismissed Hazen's case, and she sued for false arrest. *Id.* Hazen's attorney learned during discovery in the false arrest case that the arrest tape had been altered. *Id.* at 459. Hazen subsequently amended her complaint to include a claim for alteration of the arrest tape. *Id.* The court dismissed her false arrest claim, and the jury returned a verdict against Hazen on the tape alteration claim. *Id.* at 459-60.

[38] *Id.* at 464. The court held that the alteration of the tape constituted an unreasonable interference with Hazen's pending causes of action for false arrest and malicious prosecution. *Id.* The court likewise held that the pending claims were "valuable probable expectanc[ies]," and a cause of action was available for interference with these expectancies. *Id.*

In the products liability context, spoliation refers to the loss, destruction, or alteration of the product in question.[39] Most often, this spoliation occurs through actions taken by a party to the litigation. For instance, a manufacturer may be deprived of the opportunity to examine the product because of prior spoliation by the plaintiff after his expert has had the opportunity to test the product.[40] Likewise, a manufacturer or lessor of the product may destroy the product in question, thereby interfering with the plaintiff's right to recovery.[41] The most effective sanction available in this situation is the award of a default judgment against the offending manufacturer or lessor. Courts have increasingly imposed harsh sanctions against plaintiffs who spoliate, including exclusion of expert testimony[42] and even dismissal of the lawsuit.[43] In *Graves v.*

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[39] Sam LaManna, *Courts Take a Harder Line on Spoliation*, NAT'L L.J., July 26, 1993, at 17. The destruction is termed spoliation regardless of whether the destruction or loss of evidence occurred negligently or intentionally. *Id.*

[40] *Id.* Manufacturers often find themselves defending claims concerning allegedly defective products without the opportunity to inspect the products for defects because these pertinent pieces of evidence have been spoliated. *Id.*

[41] Strelov v. Hertz Corp., 566 N.Y.S.2d 646, 647 (1991). After the lessor disposed of the defective product, the court precluded him from presenting evidence regarding his liability relating to that product because it was unavailable for the plaintiff's inspection. *Id.*

[42] LaManna, *supra* note 39, at 17. Recently, many judges have excluded expert testimony in cases where spoliation has occurred. *Id.*; *see* Nally v. Volkswagen of Am. Inc., 539 N.E.2d 1017, 1021 (Mass. 1989) (precluding party's expert from testifying about his observations of spoliated product); Fire Ins. Exch. v. Zenith Radio Corp., 747 P.2d 911, 912 (Nev. 1987) (excluding testimony of insurance company's expert witness and granting summary judgment against plaintiff); *see also* American Family Ins. Co. v. Village Pontiac GMC, Inc., 585 N.E.2d 1115, 1120 (Ill. App. Ct. 1992) (barring plaintiffs from presenting any evidence, circumstantial or direct, concerning condition of car since insurer destroyed car in question).

[43] Brancaccio v. Mitsubishi Motors Co., No. 90 CIV. 7852 (RWS), 1992 WL 189937, at *1 (S.D.N.Y. July 27, 1992). The plaintiff brought a products liability action against Mitsubishi and alleged that she tripped and fell on a seatbelt that had failed to retract. *Id.* An expert for the plaintiff tested the belt and concluded it was defective. *Id.* Subsequently, the car was repossessed and none of the parties knew of its whereabouts. *Id.* Because Mitsubishi was unable to examine the seat belt, it moved to dismiss the action. *Id.* The court granted the motion, and stated that "[d]ismissal, though a drastic remedy, is warranted where a party fails to comply with discovery willfully, in bad

Daley,[44] the plaintiffs alleged that a defective furnace that the defendant manufactured caused the fire that destroyed their house.[45] The plaintiffs' insurance carrier's expert inspected the furnace, took photographs, and prepared a report stating that a defective condition in the furnace was the probable cause of the fire.[46] The plaintiffs subsequently disposed of the furnace so they could rebuild their house.[47] During discovery, the manufacturer requested the furnace, however the plaintiffs responded that it was unavailable.[48] The trial court barred the plaintiffs from presenting any evidence related to the condition of the furnace.[49] The trial court then granted the defendant's motion for summary judgment[50] and the appellate court affirmed.[51] In the products liability field, courts have demon-

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faith, or through fault." *Id.* The court determined that it should dismiss the plaintiff's claim because the plaintiff was at fault for allowing the car to be repossessed. *Id.* at *2.

[44] 526 N.E.2d 679 (Ill. App. Ct. 1988).

[45] *Graves*, 526 N.E.2d at 680. The Graveses contended that a defective furnace located in the basement of their home caused the fire. *Id.*

[46] *Id.* The plaintiff's insurance carrier and subrogee was Western States Insurance Company. *Id.* Western States' expert inspected the premises and prepared the report. *Id.*

[47] *Id.* Western States gave the plaintiffs permission to dispose of the furnace in order to remove the debris and rebuild their home. *Id.*

[48] *Id.* Heil-Quaker Corporation, the defendant, requested that the plaintiffs produce the furnace for inspection. *Id.* In response, the plaintiffs stated that the furnace was unavailable. *Id.*

[49] *Id.* Heil-Quaker requested sanctions and asked that the trial court dismiss the lawsuit or, in the alternative, bar the plaintiffs from introducing any evidence relating to the furnace's condition. *Id.* The trial court held a hearing on the defendant's motion and entered an order barring the plaintiffs from introducing any evidence concerning to the condition of the furnace. *Id.*

[50] *Graves*, 526 N.E.2d at 680. The court denied the plaintiffs' motion to reconsider, and the defendants moved for summary judgment. *Id.* The court granted the summary judgment and the plaintiffs appealed. *Id.*

[51] *Id.* at 682. The appellate court recognized that Western States and the plaintiffs knew, or should have known, that a defective condition of the furnace was decisive evidence and should have been preserved. *Id.* The court likewise acknowledged that the trial court could enter sanctions against a party pursuant to Rule 219(c) of the Illinois Supreme Court Rules for unreasonably refusing to comply with discovery requests. *Id.* The court held that the imposition of discovery sanctions was within the trial court's discretion and would not be reversed unless the trial court abused its discretion. *Id.* (citing Ralston v. Casanova, 473 N.E.2d 444, 449 (Ill. App. Ct. 1984).

strated a willingness to impose harsh penalties, including discovery sanctions and dismissals, but these remedies have fallen short of actually allowing a tort cause of action for spoliation of evidence.[52] However, if the spoliation occurred through actions taken by a party to the suit, these sanctions are adequate to compensate the injured party.

Many jurisdictions refuse to adopt the tort because other adequate remedies exist when a party to the litigation spoliates evidence.[53] In *La Raia v. Superior Court*,[54] La Raia's apartment manager employed a janitor to spray for roaches in her apartment.[55] The janitor sprayed the apartment with a pesticide developed solely for outside use.[56] La Raia became very ill and requested that the manager provide her with information regarding the type of spray used.[57] The manager destroyed the evidence and provided false information concerning the content of the spray.[58] The plaintiff initially sued the manager for negligence, then later filed a motion to amend her complaint to add a cause of action for intentional spoliation.[59] The trial court denied her motion to amend.[60] The Arizona Supreme Court reversed the trial court's decision, but limited its reversal by stating that the manager's spoliation merely aggravated her injuries rather than destroyed the evidence that could have interfered with her prospective lawsuit.[61] The court noted that the duty-to-aid principle[62] provided an adequate remedy for the plaintiff.[63] However, other courts have recognized that the existence of other remedies "does not necessarily preclude [the court] from creating a new tort for further redress."[64]

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[52] LaManna, *supra* note 39, at 20. The anti-spoliation trend's continued growth is evidenced by the courts' willingness to impose a greater variety of remedies. *Id.* If the trend continues, manufacturers will be allowed to directly address spoliation instead of building a defense around it. *Id.*

[53] Lionberger, *supra* note 2, at 192. One reason why courts have rejected the spoliation tort is that legal alternatives for controlling destruction of evidence have been available. *Id.*; *see* Miller v. Montgomery County, 494 A.2d 761, 768 (Md. Ct. Spec. App. 1985) (explaining that spoliation tort was not adopted because of existence of adequate remedies for spoliation of evidence); Solum & Marzen, *supra* note 3, at 1086-1137 (explaining that alternatives to spoliation tort exist for controlling destruction of evidence).

[54] 722 P.2d 286 (Ariz. 1986).

[55] *La Raia*, 722 P.2d at 288. The plaintiff experienced a serious roach problem and requested that the apartment manager procure a pest control service. *Id.* at 287. The manager never attempted to contact the pest control company, but authorized an unlicensed and untrained janitor to spray the plaintiff's apartment. *Id.* at 288.

[56] *Id.* The manager determined that the pesticide used in La Raia's apartment was labelled with a skull and crossbones and was designated "for outside use only." *Id.*

[57] *Id.* The manager gave her a partial list of the composition of the spray, excluding all toxic items. *Id.* La Raia's doctor examined the list and told her that none of the chemicals were toxic. *Id.* She then returned to her apartment, whereupon her condition worsened. *Id.* Shortly thereafter, she was admitted into a poison control center at a local hospital. *Id.*

[58] *Id.* Doctors at the poison control center contacted the apartment manager concerning the chemicals that had been used in the apartment. *Id.* The manager then instructed the janitor to remove the pesticide can from the apartment property. *Id.* Subsequently, he copied a list of the ingredients from an approved indoor spray and

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presented that list to the poison control center. *Id.* La Raia was then treated for a toxic ingredient that was on the list provided by the manager. *Id.* The plaintiff moved back into her apartment and continued to experience nausea and fatigue. *Id.* A friend who visited her recognized the smell of the toxic chemical in her apartment, and the toxin was appropriately identified as diazinon, a substance more toxic than the type for which the hospital had treated La Raia. *Id.*

[59] *Id.* at 288. Upon discovering the manager's destruction of the pesticide, La Raia filed a motion for leave to amend and alleged intentional spoliation of evidence. *Id.*

[60] *La Raia*, 722 P.2d at 288. The trial judge denied the motion on grounds that the amended complaint did not state a cause of action. *Id.* La Raia appealed on the grounds of abuse of discretion. *Id.* at 289.

[61] *Id.* at 290. The Arizona Supreme Court modified the lower court's order and recognized that the defendant had a duty to mitigate La Raia's harm since he contributed to her poisoning. *Id.* The court held that La Raia's amended complaint did in fact state a cause of action, but that the new spoliation tort would not be recognized because the defendant's liability was grounded in his duty to mitigate. *Id.* The court stated that when the defendant failed to provide the correct information and intentionally provided false information, he did not "spoil the evidence" but caused additional injury to the plaintiff. *Id.*

[62] *Id.* The principle provides that once an actor has harmed or exposed a person to danger, the actor has a duty to prevent further harm. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 322 (1965)).

[63] *Id.* at 289. The Arizona Supreme Court declined to recognize the spoliation tort and stated that another tort cause of action was not needed as long as adequate alternative remedies existed. *Id.*

[64] Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 437 (Minn. 1990). Although the Minnesota Supreme Court refused to recognize a cause of action for spoliation in this case, it acknowledged that the fact that alternative remedies existed did not prevent adoption of a new tort cause of action. *Id.* The court held that the plaintiff's cause of action for spoliation was premature because it was based on speculative harm to its subrogation action. *Id.* The plaintiff abandoned its subrogation action and filed suit for spoliation when it discovered that certain evidence

IV. SPOLIATION BY A THIRD PARTY

A. *Intentional Spoliation*

The first court to adopt the tort of intentional spoliation was the California Court of Appeals in *Smith v. Superior Court*.[65] In this case, the plaintiff suffered injuries when a wheel flew off a van and struck the windshield of her car.[66] Abbott Ford agreed to Smith's attorney's request that it keep certain parts of the van for future inspection.[67] Upon the plaintiff's request for the parts, Abbott Ford stated that the parts had been destroyed, lost, or transferred.[68] Smith subsequently sued Abbott Ford for "tortious interference with a prospective civil action by spoliation of evidence."[69] The trial court refused to adopt the tort and Smith appealed.[70] The court of appeals utilized the "probable expectancies" theory and reversed the trial court.[71] In adopting the new tort, the court stated that new torts are "recognized constantly" and that the absence of a previously acknowledged cause of action should not prevent a wronged party from recovering for injury.[72] To

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had been discarded. *Id.* at 435.

[65] 198 Cal. Rptr. 829 (Cal. Ct. App. 1984).

[66] *Smith*, 198 Cal. Rptr. at 831. The incident occurred on September 10, 1981, around 6:10 a.m. *Id.* Pieces of glass struck Mrs. Smith's eyes and face. *Id.* This caused permanent blindness in both eyes and impaired her sense of smell. *Id.*

[67] *Id.* Around September 25, 1981, Abbott Ford agreed with Smith's counsel to store certain parts of the van for further investigation. *Id.*

[68] *Id.* Abbott Ford no longer had the critical evidence in its possession, thereby making it impossible for the Smiths' expert to inspect the parts and determine the cause of the accident. *Id.*

[69] *Id.* The Smiths alleged that Abbott Ford "willfully, wrongfully, and intentionally, and with conscious disregard of the probable serious harm to Plaintiffs . . . conceded, lost, destroyed or otherwise disposed of the physical evidence which they had promised to maintain for Plaintiffs." *Id.* at 832.

[70] *Id.* The trial court held that no such intentional tort existed. *Id.*

[71] *Smith*, 198 Cal. Rptr. at 837. The court explained that while the intentional spoliation of evidence had not previously been recognized as an independent tort, a prospective civil suit is a "valuable probable expectancy" that must be protected. *Id.* (citing PROSSER, *supra* note 8, § 130, at 950).

[72] *Id.* at 832. The court relied on the reasoning of Prosser:

> New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the

justify the recognition of the tort, the court analogized intentional spoliation to the tort of intentional interference with prospective business advantage.[73] In *Smith*, the spoliation occurred as a result of action taken by a third person not a party to the pending litigation. Therefore, the traditional remedies utilized when a party to the impending suit spoliates evidence will not be available, and a separate cause of action is needed to fully compensate the wronged party.

B. Negligent Spoliation

Before courts will impose liability for negligent spoliation of evidence, a legally recognizable duty to protect such evidence from loss or destruction must exist.[74] The elements necessary to state a cause of action for negligent spoliation are the same as those for a typical negligence action: duty, breach, causation, and damages.[75] In most cases of negligent spoliation, a third party has inadvertently spoliated evidence. However, a third party may also intentionally spoliate evidence.

In 1984, the Third District Court of Appeals of Florida recognized a cause of action for negligent spoliation of evidence in *Bondu v. Gurvich*.[76] In *Bondu*, a hospital failed to produce medical records the plaintiff requested for use in her medical malpractice suit against one of the hospital's doctors.[77] Mrs.

> court has struck out boldly to create a new cause of action, where none had been recognized before . . . . The law of torts is anything but static, and the limits of its development are never set.

Id. (citing PROSSER, *supra* note 8, § 1, at 3).

[73] *Id.* at 836. The court noted that the business interference tort allows recovery for interference with business relations and expectations absent a binding agreement and also permits recovery where the expectations of the parties are the subject of an unenforceable contract. *Id.* (citing Buckaloo v. Johnson, 537 P.2d 865, 868 (Cal. 1975)).

[74] Lionberger, *supra* note 2, at 223. Negligent spoliation is similar to intentional spoliation. *Id.* However, before courts will impose liability for negligent loss or destruction, a legally recognized duty to protect the evidence must exist. *Id.*

[75] *Id.* at 223 n.71. A duty to preserve evidence may be grounded in an agreement between the parties, a civil statute, or a criminal statute which prohibits tampering with physical evidence. *Id.* at 223-24.

[76] 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984).

[77] *Bondu*, 473 So. 2d at 1309. Mrs. Bondu contended that the hospital was negligent per se because it violated its statutory duty under section 395.202 of the

Bondu's malpractice complaint contended that the hospital "purposely and intentionally lost and/or destroyed" anesthesiology records, thereby hindering her ability to obtain evidence for her malpractice case.[78] The trial court dismissed the spoliation counts of her complaint because at this time she had suffered no damages from the hospital's actions since her malpractice suit was still pending.[79] After Mrs. Bondu lost her malpractice case, she filed a complaint alleging that the hospital negligently lost the hospital records.[80] The trial court granted a judgment on the pleadings in favor of the hospital and Mrs. Bondu appealed.[81] The appellate court recognized a cause of action for negligent spoliation and stated that since the plaintiff had lost her medical malpractice case, it was now certain that she had suffered some damage caused by the defendant's breach of its statutorily imposed duty to maintain medical records.[82]

The *Bondu* case demonstrates the "case within a case" doctrine.[83] In order to prevail on a negligent spoliation claim, the

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Florida Code to provide her with the requested medical records. *Id.*

[78] *Id.* at 1309-10. Mrs. Bondu likewise alleged that the hospital intentionally lost or destroyed the records and frustrated her pursuit of the necessary proof to establish her case against the doctor. *Id.* at 1310.

[79] *Id.* The trial court dismissed these counts on grounds that they failed to state a cause of action since the plaintiff had not been damaged by the hospital's alleged spoliation. *Id.* at 1311. The court then entered a summary judgment in favor of the defendants. *Id.* at 1310.

[80] *Id.* Mrs. Bondu moved for a rehearing or, in the alternative, for leave to amend her complaint, both of which the court denied. *Id.* At this same time, she filed a separate action against the hospital alleging "negligent loss of records causing her to lose a medical negligence lawsuit." *Id.*

[81] *Id.* The hospital moved for judgment on the pleadings which the trial court granted because the dismissal with prejudice of the counts in the first suit was res judicata. *Id.*

[82] *Bondu*, 473 So. 2d at 1312-13. The court explained that Mrs. Bondu filed a new complaint after the entry of summary judgment against her on the medical malpractice claims. *Id.* at 1313. At this point, the fact that she had suffered some damage was certain. *Id.* The entry of summary judgment between the court's dismissal of the spoliation counts and Mrs. Bondu's filing of a new claim furnished new grounds for her action and made the doctrine of res judicata inapplicable to her claim. *Id.*

[83] Richard D. Bridgman, *Legal Malpractice—A Consideration of the Elements of a Strong Plaintiff's Cause*, 30 S.C. L. REV. 213, 234 (1979). This doctrine affords a malpractice defendant a tactical advantage because the plaintiff must make the threshold showing that the underlying action that gave rise to the alleged malpractice

plaintiff must first establish that, had the hospital's records been available, she would have successfully established the doctor's negligence and the damages resulting therefrom.[84] Because this situation presents the problem of speculative damages, many jurisdictions have rejected the tort of spoliation.[85] However, the "case within a case" dilemma arises often in the course of litigation, especially in the legal malpractice area.[86]

The California Court of Appeals also recognized the tort of negligent spoliation in *Velasco v. Commercial Building Maintenance Co.*[87] In *Velasco*, a janitor disposed of a bag of unmarked evidence held by the plaintiff's attorney for a prospective civil suit.[88] The plaintiff contended that the janitor negligently deprived him of a judgment in the prospective lawsuit.[89] Although the court recognized the tort of negligent spoliation, it dismissed the case because it found that the janitor owed no duty to the plaintiff.[90]

Many jurisdictions have refused to adopt the spoliation tort on the basis that the spoliator did not owe a duty to maintain

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would have been resolved in favor of the plaintiff. *Id.*

[84] *Id.* The plaintiff must show that the defendant's negligence was the proximate cause of his loss at a previous trial. *Id.*

[85] Lionberger, *supra* note 2, at 217. One reason that courts reject the spoliation tort is the difficulty in setting damages. *Id.*; *see* Bridgman, *supra* note 83, at 235-36 (explaining that experts can be used to establish likely amount of award lost at first trial, but defendants often object to such testimony as speculative).

[86] Bridgman, *supra* note 83, at 234. In legal malpractice cases, generally the defendant-attorney asserts that the plaintiff must prove he would have won his case against the original defendant and the amount he would have been awarded but for the attorney's negligence. *Id.*

[87] 215 Cal. Rptr. 504 (Cal. Ct. App. 1985).

[88] *Velasco*, 215 Cal. Rptr. at 505. The plaintiffs suffered injuries when a bottle exploded. *Id.* The plaintiffs alleged they took fragments of the bottle to an attorney who placed the bottle shards in a paper bag and left them on his desk. *Id.*

[89] *Id.* The plaintiffs contended that the janitor was an agent of the owner of the building where the plaintiff's attorney worked. *Id.* They also alleged that the janitor "negligently . . . destroyed or disposed of the aforesaid remnants of the exploded bottle" while cleaning the attorney's office. *Id.*

[90] *Id.* at 506-07. The court dismissed the case and explained that it was not foreseeable to the janitor that the bag contained evidence for trial since it was not appropriately marked. *Id.*

the evidence for a possible plaintiff.[91] The most important factor in determining whether a duty exists is the foreseeability of harm to the plaintiff.[92] The United States District Court for the Western District of Arkansas reasoned that under Arkansas law, "[a]bsent some special relationship or duty arising by reason of agreement, contract, statute, or other special circumstance, the general rule is that there is no duty to preserve possible evidence for another party . . . ."[93] Where a third party negligently destroys evidence, courts hold that no duty to preserve evidence exists.[94] Adoption of the tort would inadvertently create a duty to maintain evidence for the advantage of another.[95] Such a duty implicitly affects one's right to dispose of his own property.[96]

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[91] Owens, *supra* note 10, at 185. Other courts have not recognized the tort of intentional spoliation because the spoliator was not obligated to preserve the pertinent evidence for prospective litigation. *Id.*; *see* Reid v. State Farm Mut. Auto. Ins. Co., 218 Cal. Rptr. 913, 927 (Cal. Ct. App. 1985) (refusing to recognize tort for spoliation because defendant never promised to preserve evidence); Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1179 (Kan. 1987) (holding no duty to maintain evidence existed where no special relationship or agreement between parties to lawsuit existed).

[92] County of Solano v. Delancy, 264 Cal. Rptr. 721, 729 (Cal. Ct. App. 1989). In addition to foreseeability, relevant factors include:

> (1) the extent to which the transaction was intended to affect the plaintiff . . . (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm.

J'Aire Corp. v. Gregory, 598 P.2d 60, 63 (Cal. 1979).

[93] Wilson v. Beloit Corp., 921 F.2d 765, 767 (8th Cir. 1990) (quoting *Koplin*, 734 P.2d at 1179). In deciding whether to recognize a cause of action for spoliation, the court focused on whether International Paper Company had "(1) a statutory duty to preserve the [evidence]; (2) assumed a duty to preserve [the evidence]; or (3) had a duty imposed under Arkansas tort law." *Id.* at 766 (quoting Wilson v. Beloit Corp., 869 F.2d 1162, 1164 (8th Cir. 1989), *aff'd* 921 F.2d 765 (8th Cir. 1990)). Accordingly, the court failed to find that any duty existed. *Id.*; *see Koplin*, 734 P.2d at 1182 (holding that spoliation tort would not be recognized absent "contract, agreement, voluntary assumption of duty, or special relationship").

[94] Lionberger, *supra* note 2, at 218. The primary reason courts have refused to recognize the spoliation tort is the absence of a duty on the part of the spoliator to preserve evidence for a plaintiff who may potentially take legal action against another party. *Id.* at 217-18; *see* Parker v. Thyssen Mining Constr., Inc., 428 So. 2d 615, 618 (Ala. 1983) (holding that defendant had no duty to preserve evidence that plaintiff needed for third party action against manufacturer).

V. ARGUMENTS IN FAVOR OF MISSISSIPPI ADOPTING THE SPOLIATION TORT

A. *Adoption Based on Recognition of Tort Damages as Personal Property*

Mississippi law recognizes that a chose in action constitutes personal property under section 1-3-41 of the Mississippi Code.[97] In *Garrett v. Gay*,[98] the Mississippi Supreme Court held that the right to sue for tort damages was personal property which could be contracted away.[99] In 1987, in *Estate of Waitzman*, the Mississippi Supreme Court acknowledged again that rights of action were property rights.[100] Since it is a settled point of law that an individual's right to sue for damages is a property right, the court should permit persons to be compensated for interference with these rights through an action in tort.[101]

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[95] Thompson, *supra* note 7, at 591. "Absent an agreement, statutory duty, or special circumstances," courts should not impose liability against a third party who innocently disposes of property. *Id.* Otherwise, the tort could create an undue burden. *Id.*

[96] *Id.* An implicit duty interferes with a person's right to dispose of one's own property. *Id.* Therefore, it is necessary to limit liability to situations where an agreement, a statutory duty, or some other express duty exists. *Id.*; *see* Edwards v. Louisville Ladder Co., 796 F. Supp. 966, 971 (W.D. La. 1992) (declining to recognize tort because of concern with individual's right to dispose of own property and protect others from potential harm without creating tort liability).

[97] MISS. CODE ANN. § 1-3-41 (1972). The statute states that "[t]he term 'personal property,' when used in any statute, shall include . . . evidences of rights of action . . . ." *Id.*

[98] 394 So. 2d 321 (Miss. 1981).

[99] *Garrett*, 394 So. 2d at 332-23. The Mississippi Supreme Court recognized its earlier construction of section 1-3-41 of the Mississippi Code and held that personal property includes "money, chattels, things in action, and evidence of debt." *Id.* (citing First National Bank of Hattiesburg v. Ellison, 99 So. 573, 574 (Miss. 1924)); *see* Galarza v. Union Bus Lines, Inc., 38 F.R.D. 401, 404 (S.D. Tex. 1965) (recognizing right to receive damages for personal injuries is property right), *aff'd*, 369 F.2d 402 (5th Cir. 1966).

[100] Estate of Waitzman, 507 So. 2d 24, 26 (Miss. 1987). The Mississippi Supreme Court interpreted the statutory definition of personal property to include "evidences of rights of action, and all written instruments by which any pecuniary obligation . . . shall be created." *Id.* (quoting Simmons-Belk, Inc. v. May, 283 So. 2d 592, 593 (Miss. 1973)); *see* Redfern v. Collins, 113 F. Supp. 892, 895 (E.D. Tex. 1953) (recognizing right to sue for tort damages is chose in action and is property within legal sense of term).

B. *Adoption Based on Similarities Between the Spoliation Tort and Malicious Interference with Business Relations*

In *County of Solano v. Delancy*,[102] a California Court of Appeals acknowledged that the spoliation tort had been upheld in a recent decision[103] and compared it to the tort of intentional interference with prospective business advantage.[104] The court analogized the two torts since liability in each is "predicated on intentional acts designed to disrupt a potential benefit."[105]

The Mississippi Supreme Court has recognized the tort of "malicious interference with business relations of another" since 1959.[106] Under Mississippi tort law, the elements one must show to make a prima facie case of wrongful interference with business relations are similar to the elements for the tort of intentional spoliation of evidence set forth in *Delancy*. These elements include:

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[101] Richard G. Cedillo & David Lopez, *Document Destruction in Business Litigation From a Practitioner's Point of View: The Ethical Rules vs. Practical Realities*, 20 ST. MARY'S L.J. 637, 652-53 (1989). Courts in Texas have broad discretion as to what constitutes an actionable tort. *Id.* It is certain that "any intentional invasion of, or interference with property rights or personal liberty causing injury without just cause" is an actionable tort. *Id.* Furthermore, it is well established in Texas that a right to recover damages is a property right. *Id.* Therefore, Texas courts could easily recognize that destruction of evidence that interferes with one's right to recover damages is an actionable tort. *Id.*

[102] 264 Cal. Rptr. 721 (Cal. Ct. App. 1989).

[103] *See generally,* Smith v. Superior Court, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984).

[104] *Delancy*, 264 Cal. Rptr. at 728. In *Delancy*, the court compared the potential success of a lawsuit to the "reasonable probability" that a profit would be obtained from a contract or business opportunity, maintaining that this probable expectancy must be protected. *Id.*

[105] *Id.* at 729. Although the court referred to "intentional acts," it likewise stated that liability has "no relationship to voluntary undertakings." *Id.* The court explained that liability is not limited to cases where the spoliator agreed to preserve the evidence for trial. *Id. See generally* Cedillo & Lopez, *supra* note 101, at 652-53 (explaining that no duty is required for spoliation tort if analogy made to Texas common law tort of intentional interference with business or prospective contractual relations).

[106] Bailey v. Richards, 111 So. 2d 402, 407 (Miss. 1959). The Mississippi Supreme Court acknowledged that "wrongful or malicious interference with the formation of a contract or the right to pursue a lawful business, calling, trade, or occupation has been generally held to constitute a tort." (quoting 86 C.J.S. *Torts* § 43, at 955).

> (1) the acts [done to interfere with business relations] were intentional and willful; (2) [the acts] were calculated to cause damage to the plaintiffs in their lawful business; (3) [the acts] were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant . . .; and (4) actual damage and loss resulted.[107]

The court in *Delancy* announced the elements for the tort of intentional spoliation of evidence as follows:

> (1) pending or probable litigation involving the plaintiff; (2) knowledge by the defendant of the existence or likelihood of the litigation; (3) intentional acts of spoliation on the part of the defendant designed to disrupt the plaintiff's case; (4) disruption of the plaintiff's case; and (5) damages proximately caused by the acts of the defendant.[108]

The elements of the tort of intentional spoliation as set forth by the California court in *Delancy* are fundamentally similar to those of Mississippi's tort of wrongful interference with business relations. Therefore, Mississippi should adopt the new tort by analogy to provide a remedy when a third party spoliates evidence.

VI. PUBLIC POLICY CONCERNS

Many courts refuse to allow a cause of action for spoliation until an adverse ruling in the primary suit has been rendered against the plaintiff.[109] It is likewise necessary that there be actual injury done to the plaintiff resulting from the destruction of evidence; a "threat of future harm not yet realized is not enough."[110]

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[107] ACI Chemicals, Inc. v. Metaplex, Inc., 615 So. 2d 1192, 1200-01 (Miss. 1993) (quoting Protective Serv. Life Ins. Co. v. Carter, 445 So. 2d 215, 219 (Miss. 1983)).

[108] *Delancy*, 264 Cal. Rptr. at 729. The *Delancy* court reasoned these would have been the elements enumerated by the *Smith* court had it undertaken to do so. *Id.* The *Delancy* court likewise recognized that the *Smith* court would not have included an agreement on the part of the defendant as an element. *Id.*

Even recognizing the tort of spoliation, the calculation of damages is extremely difficult, and for this reason, courts have rejected the spoliation tort.[111] The court in *Petrik v. Monarch Printing Corp.*[112] stated: "It would seem to be sheer guesswork, even presuming that the evidence went against the spoliator, to calculate what it would contribute to the plaintiff's success on the merits of the lawsuit."[113] However, as discussed earlier, the "case within a case" dilemma arises often in the course of litigation, and courts have competently dealt with this situation in the past.

Finally, courts reject the spoliation tort because of the possibility of creating endless litigation.[114] Because some evidence will inevitably be unavailable at trial, a new cause of action could arise every time a party loses.[115] Furthermore, the threat of endless litigation is inconsistent with the judicial system's goal of finality of judgments.[116]

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[109] Owens, *supra* note 10, at 184. Many courts that recognize a cause of action for spoliation require that the underlying lawsuit be resolved against the plaintiff before allowing a claim for spoliation. *Id.* A resolution of the claim is required in order to prove actual injury in the spoliation action. *Id.*

[110] *Fox*, 406 N.E.2d at 183. The court held that filing suit for spoliation of evidence was premature where no actual injury had yet occurred. *Id.*

[111] *Smith*, 198 Cal. Rptr. at 835. The court stated that the calculation of damages was the "most troubling aspect" in a cause of action for intentional spoliation of evidence. *Id.*

[112] 501 N.E.2d 1312 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 735 (Ill. 1987).

[113] *Petrik*, 501 N.E.2d at 1320. The Illinois court rejected the tort of spoliation because of the speculative nature of the damages incurred. *Id.; see* Lionberger, *supra* note 2, at 217 (explaining that one reason courts reject spoliation tort is difficulty in assessing amount of damages).

[114] Thompson, *supra* note 7, at 592. Recognition of the tort could potentially result in endless litigation and frivolous claims. *Id.*

[115] *Id.* A new cause of action might accrue whenever a plaintiff loses a lawsuit because in most cases there is some critical piece of evidence that is not available at trial. *Id.*

[116] *Id.* Another problem the spoliation tort poses is the potential for endless litigation which inherently conflicts with courts' policy favoring final judgments. *Id.*

VII. CONCLUSION

Destruction of evidence is an act that obstructs the judicial process and interferes with an individual's interest in recovering damages.[117] Adoption of the tort of spoliation would protect this interest from interference. Existing Mississippi law establishes the essential foundations for acknowledging this new tort.[118] Currently, recognized remedies under Mississippi law contain too many loopholes which result in a failure to protect an injured party's interest.[119] Likewise, these remedies are only available when a party to the litigation spoliates evidence.[120] Given these considerations, the need arises to protect parties from injury caused by the destruction of evidence. By adopting the tort of spoliation of evidence in cases in which a third party has a duty to preserve evidence, courts would protect the legal right to bring suit, thereby assuring protection of injured parties and providing meaningful deterrence to potential spoliators.

Maurcie L. Kervin

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[117] *See supra* notes 1, 7, 12, 39 and accompanying text.

[118] *See supra* notes 98, 99, 100, 101, 102, 106, 107, 108 and accompanying text.

[119] *See supra* notes 15, 16, 17 and accompanying text.

[120] *See supra* notes 1, 3, 109 and accompanying text.

RECENT DECISIONS

INTENTIONAL TORTS--ALIENATION OF AFFECTIONS--AN INFERENCE OF DEFENDANT'S INTENTIONAL INTERFERENCE IN PLAINTIFF'S MARITAL RELATIONS IS SUFFICIENT TO PROVE ALIENATION[*]

Appellee[1] filed suit against the appellant[2] in Madison County Circuit Court seeking damages for alienation of her ex-husband's affections.[3] The appellee alleged that the appellant's relationship with her ex-husband tortiously interfered with her marriage and caused its dissolution.[4] The appellant contended[5] that there was no evidence of direct interference through "amorous" or "affectionate" conduct with the appellee's ex-husband.[6] The appellee countered by introducing evidence of the appellant's conduct toward her ex-husband over a period of time rather than relying on one specific instance of "amorous" or "affectionate" conduct.[7] The jury returned a verdict for the appellee after concluding that the appellant's actions were sufficient to establish that she tortiously interfered with the appellee's marriage.[8] On appeal, the Mississippi Supreme Court, *held*, affirmed.[9] Where evidence substantiated an inference of the defendant's direct or intentional interference into the plaintiff's marriage, courts were justified in ruling that the defendant tortiously interfered with the plaintiff's marriage and alienated the plaintiff's spouse's affections. *Kirk v. Koch*, 607 So. 2d 1220, 1222-23 (Miss. 1992).

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[*] Best Case Note Award. Presented by the law firm of Ott, Purdy and Scott of Jackson, Mississippi.

[1] The appellee was Judy Koch, ex-wife of Jim Jeffries. Kirk v. Koch, 607 So. 2d 1220, 1221 (Miss. 1992).

[2] *Kirk*, 607 So. 2d at 1220. The appellant was Shirley Kirk. *Id.* Kirk and her late husband had known Jeffries for 20 years. *Id.* at 1221. Jeffries and Mr. Kirk were discussing forming a new business when Mr. Kirk's death occurred. *Id.* Following her husband's death, Jeffries and Mrs. Kirk became close friends. *Id.* Mrs. Kirk contributed $21,700 to Jeffries' new business after her husband's death. *Id.* at 1221. Koch did not learn of Mrs. Kirk's cash contribution until she discovered Jeffries' deposit slip and confronted her husband. *Id.*

[3] *Id.* at 1220. Koch's discovery of the deposit slip instigated her suspicion of Jeffries' relationship with Kirk. *Id.* at 1221.

[4] *Id.* at 1220. Koch alleged that Kirk's actions constituted "direct and intentional interference . . . into Koch and Jeffries' marriage." *Id.* at 1222. The Jeffries' marriage terminated eight months after Koch heard Kirk's name for the first time. *Id.* at 1221-22.

[5] *Id.* at 1221. Kirk contended that she did not purposefully interfere with the Jeffries' marriage. *Id.* She claimed that she bore no malevolent feelings towards their marriage. *Id.* at 1222. Kirk denied Koch's allegation that Jeffries' "affections" for his wife ended as a result of their relationship. *Id.*

[6] *Id.* at 1222. Neither party presented evidence to the court that Kirk and Jeffries had a sexual relationship. *Id.* Furthermore, neither party presented evidence that Kirk

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and Jeffries behaved in an "amorous" or "affectionate" manner such as "hugg[ing], kiss[ing], carress[ing], or embrac[ing] . . . ." *Id.* Neither Jeffries' daughter by a prior marriage who lived with Kirk nor Koch's private investigator observed any "amorous" or "affectionate" conduct between Kirk and Jeffries. *Id.* at 1221-22.

[7] *Kirk*, 607 So. 2d at 1222. Koch attempted to carry her burden of proof by proving Kirk's indirect interference into her marriage. *Id.* at 1222. As evidence, Koch introduced the number of checks and amount of money given by Kirk to Jeffries; Kirk's payment of Jeffries' medical bills; Jeffries' residence in the Kirk home for six weeks after his wife asked him to leave their home; the residence of Jeffries' daughter by a former marriage in the Kirk home for one year as of the trial date; Jeffries' free use of a vehicle provided by Kirk; and Kirk's payment of Jeffries' attorney fees for his divorce from Koch. *Id.* Furthermore, Koch testified when she inspected Jeffries' trailer where he claimed to reside during business trips to Kirk's hometown, Jeffries had not connected the electricity. *Id.* at 1221. This inspection was conducted without Jeffries' knowledge prior to Koch's separation from Jeffries. *Id.* Following her inspection of the trailer, Koch testified that she telephoned the Kirk home late at night to confirm her suspicion of Jeffries' presence in Kirk's house. *Id.* A female voice answered and responded that Jeffries was there. *Id.* Someone on the receiving end terminated the call before Koch spoke to Jeffries. *Id.*

[8] *Id.* at 1220. Koch sought $75,000 in actual damages and $50,000 in punitive damages. *Id.* at 1224. The jury awarded Koch $50,000 in damages for alienation of affections. *Id.* at 1220. The jury ruled in Kirk's favor on a criminal conversation charge. *Id.*

[9] *Id.* at 1224. Kirk claimed three bases for appeal of the circuit court's decision: (1) whether Koch proved the necessary elements for a prima facie case of alienation of affections; (2) whether evidence of Jeffries' adulterous affair was properly excluded from the record; and (3) whether $50,000 was an excessive damage award for alienation of affections. *Id.* at 1221. The Mississippi Supreme Court affirmed the circuit court's decision on each issue presented on appeal. *Id.* at 1224.

As early as 1745,[10] English courts recognized a cause of action for the loss of a spouse's consortium.[11] Although English courts never recognized the tort of alienation of affections,[12] a United States jurisdiction recognized alienation of affections as a separate tort in 1866 with subsequent recognition by all states except Louisiana.[13] In 1926, the Mississippi

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[10] Robert C. Brown, *The Action for Alienation of Affections*, 82 U. PA. L. Rev. 472, 472 n.1 (1934). Brown noted that the earliest English case appears to be Winsmore v. Greenbank, 125 Eng. Rep. 1330 (K.B. 1745). Brown, *supra*. The origin of tort law governing domestic relations could be traced to its common law roots in the ancient writ for enticing a servant away. William M. Kelly, Note, *The Case for Retention of Causes of Action for Intentional Interference With the Marital Relationship*, 48 NOTRE DAME L. REV. 426, 427 (1972). This writ could only be utilized by a head of a household as compensation for the loss of his servant's services. *Id.* at 427. Through the evolution of this ancient writ, the early common law recognized a husband's property right in his wife's services. *Id.*; *see* Duffies v. Duffies, 45 N.W. 522, 523 (Wis. 1890) (observing that early common law viewed wife as "inferior" to her husband with no "personal identity" apart from his identity). After 1850 most states adopted the Married Women's Property Acts. Thomas K. Leeper, Comment, *Alienation of Affections: Flourishing Anachronism*, 13 WAKE FOREST L. REV. 585, 588 (1977). The Married Women's Property Acts forced the law to recognize wives as equals to their husbands. *Id.* As a result, the law ceased to recognize a husband's property right in his wife's love and affection. *Id.* The law gradually began to place emphasis on affections, morality, and emotional interests rather than marital services. James Leonard, Note, Cannon v. Miller: *The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina*, 63 N.C. L. REV. 1317, 1320 (1985).

[11] Brown, *supra* note 10, at 472. The crux of an action for alienation of affections was not a loss of affections per se but rather an action for an injury to a property right. *Id.* The bundle of rights in the term "consortium" included the spouse's exclusive right to the affections, sexual relationship, society, and companionship of the other spouse. *Id.*

[12] Kelly, *supra* note 10, at 428 (citing Gottlieb v. Gleiser, 1 Q.B. 267 (1958)). *Gottlieb* involved parent-in-laws directly interfering with their son's marriage. *Gottlieb*, 1 Q.B. at 267-68. The *Gottlieb* court stated that, although United States courts acknowledged the doctrine, English courts had no "desire" to recognize alienation of affections. *Id.* at 268. However, English courts did recognize an action for enticement. *Id.* The *Gottlieb* court refused to allow a spouse to maintain an action against her parents-in-law. *Id.* at 269.

[13] Leonard, *supra* note 10, at 1319-20. New York was the first American court that recognized alienation of affections as a proper cause of action. *Id.* at 1319 n.26 (citing Heermance v. James, 47 Barb. 120 (N.Y. App. Div. 1866)). Alienation of affections generally required the plaintiff to prove that the defendant's malevolent interventions caused the loss of his spouse's love and affections. David W. Steffensen, Comment, Nelson v. Jacobsen: *A New Causation Standard for Alienation of Affection Actions*, 1984 UTAH L. REV. 885, 887. Alienation of affections was an intentional tort. Nelson v.

Supreme Court considered a parent's liability for alienating the affections of their child's spouse in *McRae v. Robinson.*[14] *McRae* conclusively established the plaintiff's burden of proof in a parental alienation of affections suit.[15] In *McRae*, the appellee[16] and the appellant's[17] daughter maintained a clan-

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Jacobsen, 669 P.2d 1207, 1216-17 (Utah 1983). An intentional tort is "[a] tort in which the actor is expressly or impliedly judged to have possessed intent or purpose to injure." BLACK'S LAW DICTIONARY 811 (6th ed. 1990). Even if a plaintiff proved that his spouse abandoned him or if his spouse and the defendant engaged in sexual intercourse, he did not satisfy his burden of proof unless he convinced the jury that the defendant's wrongful conduct precipitated the alienation or separation. Steffensen, *supra* at 887. Proof of adultery was not required to sustain an action for alienation of affections because "the interest protected [was] a spouse's right to marital affection, not an exclusive right of sexual intercourse." Leonard, *supra* note 10, at 1320. However, proof of adultery aggravated damages despite the fact that it did not singularly precipitate the action. Brown, *supra* note 10, at 473. Because there was no sexual intercourse requirement, alienation of affections claims "[could] be brought against a meddling mother-in-law, friend or relative." Leeper, *supra* note 10, at 589. As a defense to alienation of affections suits, some jurisdictions allowed the defendant to show that the plaintiff's spouse was the "pursuer or initiator." Kay Kavanagh, Note, *Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulment*, 23 ARIZ. L. REV. 323, 326 (1981). Other jurisdictions allowed this evidence to mitigate damages only. *Id.* The defendant's proof of the plaintiff's spouse's consent to the activity that resulted in the alienation was another common defense that defeated the plaintiff's claim. *Id.* at 327. A defendant's ignorance of the marital relation quashed an alienation of affections action as well. *Id.* at 326-27. Finally, defendants who were affiliated with the plaintiff's spouse in a "professional or familial relationship" enjoyed a limited privilege to offer advice. *Id.* at 327. The companion tort to alienation of affections was criminal conversation. Marshall L. Davidson, III, Comment, *Stealing Love in Tennessee: The Thief Goes Free*, 56 TENN. L. REV. 629, 630 (1989). Criminal conversation required proof of marriage and sexual intercourse. *Id.* at 631. "Once sexual intercourse has been demonstrated, only the defendant's denial, the plaintiff's consent, and the statute of limitations can be raised in defense. Consequently, criminal conversation has been aptly called a strict liability tort, with damages presumed upon proof of the offending conduct." Kavanagh, *supra* at 325.

[14] 110 So. 504 (Miss. 1926).

[15] *McRae*, 110 So. at 507. *Tucker v. Tucker* was the first alienation of affections case in Mississippi. Tucker v. Tucker, 19 So. 955, 956 (Miss. 1896). *Tucker*, like *McRae*, involved a parent-in-law alienating the affections of their child's spouse. *Id.* at 955-56.

[16] *McRae*, 110 So. at 505. The appellee was Rayburn Robinson. *Id.* His wife was Eloise Keeton Robinson. *Id.*

[17] *Id.* The appellant was Mrs. Daisy Keeton, the mother of Eloise. *Id.* The other appellants were Earl Keeton, Mrs. Keeton's son; Ouida Keeton, Mrs. Keeton's single daughter; Mrs. Maud McRae, Mrs. Keeton's married daughter; David McRae, Maud's husband; and W. M. Carter, Ouida's employer. *Id.* The trial court and Mississippi Supreme Court collectively released all the appellants from liability except Mrs. Keeton.

destine affair for two years without the appellant's knowledge.[18] The couple eloped and afterwards boarded a train for Chicago.[19] After the appellant learned that her daughter was legally married,[20] she contacted the police and had the police intercept the couple at a train station.[21] The appellant came to the police station to see her daughter and new son-in-law, whereupon she convinced her daughter to return to Mississippi without her new husband.[22] A few days later, the appellee visited the appellant's home to speak with his wife.[23] When the appellant refused to allow him to visit with his wife, the appellee filed an alienation of affections suit.[24] The jury returned a verdict for the appellee from which the appellant

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Id. Therefore, when the text referred to the appellant, it only referred to Mrs. Keeton. *Id.*

[18] *Id.* at 505. Ray and Eloise met at a party and afterwards maintained a relationship for two years. *Id.* Ray never came to Eloise's home. *Id.* Ray and Eloise wrote many letters to each other. *Id.* Eloise received Ray's letters by having Ray send them to her girlfriends' houses. *Id.* Mrs. Keeton never had any knowledge of their courtship. *Id.*

[19] *Id.* A justice of the peace married Ray and Eloise in Ellisville, Mississippi. *Id.* at 505-06. After the ceremony, they planned to travel by train to Chicago via Birmingham and Chattanooga. *Id.* at 505.

[20] *Id.* At the request of Ouida, Mr. Carter went to Ellisville where he reviewed the marriage records. *Id.* at 506. He notified Mrs. Keeton that Ray and Eloise were legally married. *Id.*

[21] *McRae*, 110 So. at 506. Mrs. Keeton, accompanied by the county sheriff, went to Ellisville to conduct her own investigation. *Id.* She discovered that Ray and Eloise had purchased train tickets. *Id.* Mrs. Keeton and her son-in-law, McRae, spoke with the Laurel chief of police about the situation. *Id.* Mrs. Keeton persuaded him to issue a telegram to have the police intercept the couple at the train station in Birmingham. *Id.* The telegram said that Ray was "charged with perjury and married girl under age." *Id.* After an unsuccessful attempt to capture the couple in Birmingham, the Chattanooga police apprehended them. *Id.* The Chattanooga police detained the couple pending the arrival of Mrs. Keeton. *Id.*

[22] *Id.* Mrs. Keeton caught the first train to Chattanooga. *Id.* The parties had a vociferous meeting that resulted in Eloise's return to her mother's home. *Id.*

[23] *Id.* Ray travelled to Chicago after his detainment in Chattanooga. *Id.* Ray returned to Mississippi in hopes of seeing his wife. *Id.*

[24] *Id.* Ray instituted a writ of habeas corpus for possession of his wife before he filed the alienation of affections suit. *Id.* The case did not disclose the result of the habeas corpus suit. *Id.*

appealed, alleging error in the jury instructions.[25] The Mississippi Supreme Court noted that in alienation suits where a plaintiff sued their spouse's parents,[26] the fact finder's proper inquiry was whether the evidence proved that the parent acted with malice or whether the parent was motivated for the safety and welfare of their child.[27] The court stated that part of the plaintiff's burden of proof was overcoming the legal presumption that a parent acted for their child's "best interest."[28] If the evidence established that the parent was motivated by genuine concern, they were not liable for damages even if their actions were arguably wrongful.[29] The Mississippi Supreme Court reversed and remanded the case because the lower court failed to properly articulate the malice standard for parental liability in the jury instructions.[30]

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[25] *Id.* The jury returned a $9,500 verdict in Ray's favor. *Id.* The case did not disclose whether Ray and Eloise's marriage resumed following the trial. *Id.*

[26] *McRae*, 110 So. at 507. Commentators have noted that "more suits for alienation of affections [were] brought against parents and other very close relatives of the alienated spouse than against any other class of persons." Brown, *supra* note 10, at 483; *see also* Martin v. Ill. Cent. R.R., 149 So. 2d 344, 345 (Miss. 1963) (litigating alienation of affections claim against former brothers and sisters-in-law); *cf.* Creason v. Myers, 350 N.W.2d 526, 528 (Neb. 1984) (discussing that alienation of affections suit did not have to involve paramours).

[27] *McRae*, 110 So. at 507. The Mississippi Supreme Court stated it was inadequate for the plaintiff to prove a parent convinced their child to abandon their spouse. *Id.* The plaintiff must have proved the parent's malevolent motives and wrongful acts to meet their burden of proof. *Id.*; *see also* Glatstein v. Grund, 51 N.W.2d 162, 166 (Iowa 1952) (holding that parents protected by higher burden of proof in defending wrongful nature of their actions in alienation of affections suits).

[28] *McRae*, 110 So. at 507. The law assumed that a parent acted for the happiness and welfare of their child. *Id.* Courts presumed parental good faith in their dealings with their children in an action for alienation of affections. Koehler v. Koehler, 79 N.W.2d 791, 796 (Iowa 1956). Commentators have referred to the presumption of parental good faith as "the most important defense which can be raised in an alienation suit." Brown, *supra* note 10, at 483.

[29] *McRae*, 110 So. at 507. "The act[s] of a parent . . . may be wrongful . . . [and] without a reasonable excuse, but, unless the act was intentionally wrong, it would not constitute such malice as would support an action for such alienation of affections." *Id.*; *see also* Krenkle v. Selleck, 268 P. 807, 808 (Kan. 1928) (holding plaintiff failed to prove parents' committed actions with malice). "[A] charge to the jury which ignores the favorable presumption accorded to a relative where the defendant is entitled to the same, is reversible error." Brown, *supra* note 10, at 486.

Two years after *McRae*, Mississippi first considered alienation of affections by a paramour in *Brister v. Dunaway*.[31] In *Brister*, the appellee sued his wife's lover for alienation of his wife's affections.[32] Following testimony that included the appellant's admission of having sexual relations with the appellee's wife,[33] the jury returned a verdict awarding both compensatory and exemplary damages to the appellee.[34] The defendant appealed to the Mississippi Supreme Court alleging error in the lower court's jury instructions on the plaintiff's burden of proof[35] and error from the jury's consideration of punitive damages.[36] The court responded that the jury instructions "must be considered together as one instruction," and as such, the instructions clearly defined that the plaintiff must have proved his case by a preponderance of the evidence before the jury returned a verdict in his favor.[37] In addition, the court decided that there was no separate instruction required for proximate cause in this case.[38] The court held that if the evidence proved the plaintiff's allegations, then the tort was substantiated and "the injuries necessarily followed as the result of a tort."[39] The court noted that if the defendant had removed the plaintiff's spouse from her home at her request because of mistreatment by her husband, then that would provide a complete defense.[40] Finally, the court determined that the jury's consideration of exemplary damages was not reversible error because of ample evidence of the appellant's wrongful conduct with the appellee's wife.[41]

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[30] *McRae*, 110 So. at 508. The jury instructions conflicted. *Id.* The gist of the instructions made the alienation of Eloise's affections controlling without consideration of the motives which may have caused Mrs. Keeton's actions. *Id.*

[31] 115 So. 36 (Miss. 1928).

[32] *Brister*, 115 So. at 37. The appellee was the husband. *Id.* In addition to the charge of alienation of affections, the husband also accused the defendant of loss of consortium of plaintiff's wife, deprivation of her society and companionship, and having sexual relations with his wife. *Id.*

[33] *Id.* at 38. The appellee's wife and the appellant had a child before she obtained her divorce from the appellee. *Id.*

[34] *Id.* at 37. The jury awarded the appellee a $2,000 verdict. *Id.* The case did not differentiate the amount of the judgement that represented punitive damages and compensatory damages. *Id.* at 37, 39; *cf.* Bailey v. Huling, 377 A.2d 220, 224 (R.I. 1977) (holding that jury was capable of awarding both punitive and compensatory damages under appropriate circumstances).

[35] *Brister*, 115 So. at 38. The appellant argued that one particular part of one of the instructions diminished the appellee's burden of proof to less than a preponderance of the evidence standard. *Id.*

[36] *Id.* at 39. The Mississippi Supreme Court found that the jury's consideration of punitive damages had no detrimental effect on the appellant. *Id.* The appellant also appealed a number of other jury instructions he requested that were omitted by the circuit court. *Id.* at 38. The court reviewed each of these omitted instructions individually. *Id.* at 38-39. The court rejected the error alleged by the exclusion of each of them. *Id.*

Shortly after *Brister*, the Mississippi Supreme Court articulated a definitive evidentiary standard for an alienation of affections suit in *Stanton v. Cox*.[42] In *Stanton*, the appellant had an affair with the appellee's ex-husband.[43] After discovering her husband's unfaithfulness, the appellee confronted her husband, whereupon he admitted the affair and asked her for a divorce.[44] The appellee and her husband reconciled before any legal action was taken.[45] The appellant continued to pursue her lover despite his reconciliation with his wife.[46] After discovering evidence of her husband's renewed unfaithfulness,[47] the appellee obtained a divorce and filed suit against the appellant.[48] The jury returned verdicts for the appellee in two separate trials in circuit court.[49] On appeal, the Mississippi Supreme Court held that the lower court had applied the correct standard of law for the plaintiff's burden of proof: the plaintiff must have proved that the defendant's conduct was the "direct" or "active" interference that caused the alienation of the plaintiff's spouse's affections.[50] The court determined that the evidence verified that the appellant "willful[ly] and active[ly]" interfered with the appellee's marriage.[51] Thus, the court affirmed the jury's verdict.[52] Finally, in response to the appellant's contention that the trial court should have permitted her to present her financial condition to the jury, the court ruled that the lower court's exclusion of this evidence was proper because "the financial condition of [the appellant] in defense or in mitigation of damages in a suit for alienation of affection[s]" was not appropriate.[53]

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[37] *Id.* at 38. The appellant's choice of one phrase out of an entire set of jury instructions as lowering the plaintiff's burden of proof was improper. *Id.*

[38] *Id.* at 39. The defendant requested a jury instruction for proximate cause. *Id.* at 38. The court held that substantiation of "one or all of the counts" alleged by the plaintiff in his cause of action negated the question of proximate cause. *Id.* at 39.

[39] *Id.* at 39. Therefore, the court decided that the appellee's burden of proof did not include proximate cause. *Id.* However, other jurisdictions have held that the defendant's actions do not have to be the only cause of alienation but the plaintiff must have proved the defendant to be the "controlling, procuring, or effective cause of the alienation." 41 C.J.S. *Husband and Wife* § 247 (1991); *see* Hunt v. Chang, 594 P.2d 118, 124-25 (Haw. 1979) (holding that plaintiff did not prove that defendant's wrongful conduct was primary cause in alienation of his spouse's affections). Furthermore, one court held that the conduct of the defendant in alienating the plaintiff's spouse's affections must outweigh the cumulative effect of all other causes. Nelson v. Jacobsen, 669 P.2d 1207, 1219 (Utah 1938). The court included the behavior of the plaintiff and his spouse in its definition of causes. *Nelson*, 669 P.2d at 1219.

[40] *Brister*, 115 So. at 38-39. The court decided that the appellant was not harmed by the omission of this instruction because the trial court directed the jury that if the appellant had done nothing to alienate the affections of the appellee's spouse they should return a verdict for the appellant. *Id.* at 39. Authorities have noted that a majority view recognized a plaintiff's spouse's voluntary separation from her husband due to no wrongful conduct of the defendant absolved the defendant of liability. W. R. Habeeb, Annotation, *Elements of Causation in Alienation of Affections Action*, 19 A.L.R.2D 471, 486-87 (1951).

[41] *Brister*, 115 So. at 39. The court decided that the appellee proved "ample evidence" of the appellant's wrongful conduct to justify the jury's consideration of punitive damages. *Id.*; *see also* Zarrella v. Robinson, 460 A.2d 415, 418 (R.I. 1983) (holding once court determined evidence established possibility of punitive damages jury decided whether they were awarded).

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[42] 139 So. 458 (Miss. 1932).

[43] *Stanton*, 139 So. at 459-60. The appellant was Dorothy Stanton, a resident of Pass Christian, Mississippi. *Id.* at 459. The appellee was Rita Cox, a resident of Oklahoma. *Id.* at 458. Stanton and Cox's ex-husband once engaged themselves for marriage, but during that time had had no contact for 15 years except one brief social encounter. *Id.* at 459. Following a business trip to Memphis, Mr. Cox visited Stanton in Mississippi for two days without his wife's knowledge. *Id.* After that encounter, the two started an amorous correspondence. *Id.* Following his first visit to Mississippi, Mr. Cox returned three or four more times over the next four years. *Id.*

[44] *Id.* Mrs. Cox found one of Stanton's love letters after it fell from her husband's pocket. *Id.* She then searched his office where she discovered nearly 200 more evidencing her husband's affair with Stanton. *Id.* The letters affectionately spoke of their desire to be together. *Id.*

[45] *Id.* After a brief separation due to a family member's illness, the Cox's decided against a divorce. *Id.* During this separation, Mrs. Cox sent 40 or 50 of Stanton's letters to a lawyer's office where a stenographer transcribed and photocopied them. *Id.* The stenographer swore that the copies were correct. *Id.* Following the reconciliation, Mrs. Cox returned the letters to her husband. *Id.* He destroyed them in her presence. *Id.* Mrs. Cox introduced the copies as evidence at trial. *Id.*

[46] *Id.* at 460. Stanton continued writing her amorous letters to Cox for two years after learning of his reconciliation with his wife. *Id.* The final letter stated that "we must not lose each other." *Id.*

[47] *Id.* at 459. Mrs. Cox suspected that the affair continued after her reconciliation with her husband. *Id.* To confirm her suspicions, Mrs. Cox searched her husband's office where she discovered "letters, telegrams, and a bill for roses sent by him to Mrs. Stanton . . . ." *Id.*

[48] *Stanton*, 139 So. at 460. Mr. and Mrs. Cox divorced nearly four and one-half years after the affair began. *Id.*

[49] *Id.* In the first trial, the jury returned a $50,000 verdict for Cox. *Id.* The circuit court set this verdict aside following Stanton's motion for a new trial. *Id.* In the second trial, the jury also returned a verdict for Cox. *Id.* The circuit court ordered a remittitur of $15,000 from the jury's $30,000 verdict. *Id.* Stanton appealed that $15,000 judgement to the Mississippi Supreme Court. *Id.*

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[50] *Id.* at 460-61. The court quoted from a Kentucky decision which enunciated the appropriate standard for the plaintiff's burden of proof. *Id.* at 460 (quoting Scott v. O'Brien, 110 S.W. 260 (Ky. 1908)). *Scott* established that where the plaintiff must prove that the defendant's "direct interference" or "active interference" was the cause of the alienation of the plaintiff's spouse's affections. *Scott,* 110 S.W. at 262; *see* Long v. Fischer, 499 P.2d 1063, 1067 (Kan. 1972) (stating plaintiff must prove defendant's willful and malicious conduct alienated the plaintiff's spouse's affections to satisfy his burden of proof); Muchisky v. Kornegay, 741 S.W.2d 43, 47 (Mo. Ct. App. 1987) (noting that plaintiff must prove defendant's wrongful conduct alienated plaintiff's spouse's affections to recover in alienation of affections action); Shaw v. Stringer, 400 S.E.2d 101, 102 (N.C. Ct. App. 1991) (holding that to meet his burden of proof plaintiff must prove that defendant's willful intervention into plaintiff's marriage caused alienation of plaintiff's spouse's love and affection). The Mississippi Supreme Court acknowledged that the standard applied by the *Scott* court was the majority rule in the United States. *Stanton*, 139 So. at 460. *See generally* 41 AM. JUR. 2D *Husband and Wife* § 466 (1968) (discussing generally elements of alienation of affections).

[51] *Stanton,* 139 So. at 461. The court decided that Stanton's letters and their contents "show[ed] a willful and active interference with the injured wife's right to the consortium or conjugal society [of her husband], which is the basis of this character of action." *Id.*

[52] *Id.* at 462. The court held that the jury was "warranted" in its decision. *Id.* at 461. The evidence established that Stanton "actively and aggressively sought to hold [Mr. Cox] when he struggled to withdraw from the unholy alliance . . . ." *Id.*; *see also* Coulter v. Renshaw, 418 N.E.2d 489, 490 (Ill. App. Ct. 1981) (describing defendant's active interference in plaintiff's marriage as including "promises of trips, money and other items which plaintiff could not afford"); Gorder v. Sims, 237 N.W.2d 67, 70 (Minn. 1975) (recognizing defendant's active interference in plaintiff's marriage in defendant's statement "*I'm going to win her, I'm going to get her, I want her*") (emphasis supplied).

The Mississippi Supreme Court increased the plaintiff's burden of proof for punitive damages in *Walter v. Wilson.*[54] In *Walter*, the appellant sued the appellee for alienating the affections of his wife.[55] The trial court determined that the appellee had committed adultery with the appellant's wife.[56] The jury returned a one dollar verdict for the appellant.[57] After the trial court denied the appellant's motion for a new trial, he appealed to the Mississippi Supreme Court because the trial court did not allow the jury to consider punitive damages.[58] The court stated that for a jury to consider punitive damages, the "testimony must show that the acts of the defendant in alienating the affection of the spouse were done with malice or that there were circumstances of aggravation."[59] By increasing the plaintiff's burden of proof for punitive damages, the court signaled its recognition of the "modern trend" that other jurisdictions had implemented to protect defendants.[60] Since the appellant had proven the appellee's adulterous conduct at trial, the court held that the jury could presume the defendant acted with malice.[61] As a result, the court reversed the lower court and held that the jury should have considered punitive damages.[62]

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[53] *Stanton*, 139 So. at 462. The court remarked that "[t]he injured party is entitled to recover for the tort without regard to whether the wrongdoer is a millionaire or a pauper." *Id.* *Contra* Hardy v. Raines, 310 S.W.2d 494, 498 (Ark. 1958) (holding that jury's determination of punitive damages considered evidence of defendant's financial condition); Tice v. Mandel, 76 N.W.2d 124, 137 (N.D. 1956) (noting that jury may consider defendant's financial status when fixing amount of exemplary damages); Hargraves v. Ballou, 131 A. 643, 647 (R.I. 1926) (finding that jury may determine amount of punitive damages with evidence of defendant's wealth).

[54] 228 So. 2d 597 (Miss. 1969).

[55] *Walter*, 228 So. 2d at 598. The appellant was William S. Walter. *Id.* The appellee was Robert A. Wilson. *Id.* Walter also sued Wilson for criminal conversation with his wife. *Id.*

[56] *Id.* The Mississippi Supreme Court noted that the record disclosed that Wilson had committed adultery with Walter's wife. *Id.*

[57] *Id.* Walter alleged that the paucity of the verdict evidenced the "bias and prejudice on the part of the jury." *Id.* One court held that the inadequacy of jury verdicts evidenced "passion or prejudice" against a plaintiff. Bracken v. Champlin, 220 P. 1027, 1027 (Kan. 1923). Furthermore, courts have found one hundred dollar jury verdicts inadequate to compensate a plaintiff where the evidence clearly proved alienation of affections. Sheffield v. Beckwith, 96 A. 316, 318 (Conn. 1916). Commentators have described the determination of damages in alienation of affections suits as uncertain. Brown, *supra* note 10, at 499-500. "Recoverable damages in a cause of action for alienation of affections included mental anguish, embarrassment, disgrace, humiliation, and loss of social position." Davidson, *supra* note 13, at 640. Because of the possibility of substantial verdicts in these actions, some commentators have argued that alienation of affections provided "a fertile field for extortion." Kelly, *supra* note 10, at 430. As a result, these commentators argued for a limitation on alienation of affections actions. *Id.*

[58] *Walter*, 228 So. 2d at 598. The jury did not consider the issue of punitive damages for criminal conversation. *Id.* Walter alleged the trial court's refusal to allow the jury to consider punitive damages was reversible error. *Id.* Authorities have noted that the general rule for damages in criminal conversation actions allowed the plaintiff

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to recover punitive damages. 41 AM. JUR. 2D *Husband and Wife* § 485 (1968).

[59] *Walter*, 228 So. 2d at 598. The court remarked that the malice standard for punitive damages was the modern trend in alienation of affections cases. *Id.*; *see* Heist v. Heist, 265 S.E.2d 434, 438 (N.C. Ct. App. 1980) (stating that plaintiff must prove "circumstances of aggravation" before jury can award punitive damages); Sebastian v. Kluttz, 170 S.E.2d 104, 116 (N.C. Ct. App. 1969) (holding that punitive damages are recoverable in alienation of affections actions where plaintiff proved defendant's behavior was "willful, aggravated, malicious, or of a wanton character").

[60] *Walter*, 228 So. 2d at 598. One commentator suggested that the plaintiff must prove "malice or wantonness" to draw a distinction between punitive and compensatory damages. Brown, *supra* note 10, at 501; *see* Kleber v. Allin, 190 N.W. 786, 787 (Minn. 1922) (finding that jury could award punitive damages only when plaintiff proved defendant's actions were "malicious"); Cottle v. Johnson, 102 S.E. 769, 771 (N.C. 1920) (holding jury could not award punitive damages unless plaintiff proved defendant acted with "personal ill will to the plaintiff"); Button v. Knight, 115 A. 499, 502 (Vt. 1921) (deciding that exemplary damages were appropriate since defendant's behavior exhibited "wanton disregard" for plaintiff's marriage). Furthermore, a plaintiff did not always have to plead punitive damages in his pleadings before a jury could award them. Brown, *supra* note 10, at 201; *see* Joseph v. Naylor, 101 A. 846, 847 (Pa. 1917) (holding jury permitted to consider punitive damages despite plaintiff's failure to specifically plead them).

[61] *Walter*, 228 So. 2d at 598. The common law presumed that the actor acted with malice when he committed adultery with another's wife. *Id.*; *see also* Bevers v. Bradstreet, 280 S.W. 667, 669 (Ark. 1926) (holding that jury can presume malice from act of adultery); Miller v. Pearce, 85 A. 620, 623 (Vt. 1913) (directing that if plaintiff proved defendant committed adultery with plaintiff's wife jury could presume defendant's malice).

[62] *Walter*, 228 So. 2d at 598. The court concluded that the jury should have had the opportunity to consider the question of punitive damages because of Wilson's malice. *Id.* Other jurisdictions have held that when plaintiff successfully proved additional wrongful conduct on the defendant's part beyond that required for compensatory damages, the jury properly awarded punitive damages. Nelson v. Jacobson, 669 P.2d 1207, 1219 (Utah 1983) (quoting *Heist*, 265 S.E.2d at 438) (citing 41 AM. JUR. 2D

Twenty-one years after *Walter*, the Mississippi Supreme Court determined that divorce was no bar to recovery in *Overstreet v. Merlos*.[63] In *Overstreet*, the circuit court granted the appellee's motion to dismiss the appellant's alienation of affections suit.[64] The appellee contended that the appellant's divorce "extinguished [the appellant's] right to file any action wherein the cause of action accrued only by virtue of marriage."[65] On appeal, the Mississippi Supreme Court held that an alienation of affections cause of action accrued whenever the defendant completed the alienation of the plaintiff's spouse's affections.[66] The court noted that a plaintiff's divorce from their spouse was irrelevant to the plaintiff's civil tort claims against third party defendants.[67] As a result, the court decided that the appellant's divorce could not retroactively bar his alienation of affections claim.[68] Finally, the appellee unsuccessfully argued that the court should abolish alienation of

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Husband and Wife § 485 (1968)).

[63] 570 So. 2d 1196 (Miss. 1990).

[64] *Overstreet*, 570 So. 2d at 1197. The appellant was Shawn Overstreet. *Id.* The appellee was Dr. Ricardo Merlos. *Id.* Merlos filed a motion to dismiss Overstreet's action for failure to state a claim, pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure. *Id.*

[65] *Id.* The circuit court granted Merlos' motion to dismiss but it did not disclose its rationale in the record. *Id.* at 1198.

[66] *Id.* at 1197-98. The Mississippi Supreme Court noted that Merlos completed the alienation of Overstreet's wife's affections prior to the Overstreets' divorce. *Id.* at 1197. The court also remarked that it was apparent that Merlos' relationship with Overstreet's wife was the cause of the plaintiff's divorce. *Id.* A Wisconsin court observed that even though an action for alienation of affections formed over a period of time, it was not actionable until the defendant completed the alienation. Dobrient v. Ciskowski, 195 N.W.2d 449, 451 (Wis. 1972). Therefore, Overstreet's cause of action accrued before his divorce. *Overstreet*, 570 So. 2d at 1197.

[67] *Overstreet*, 570 So. 2d at 1198. Because the divorce had no effect on Overstreet's cause of action, the lower court improperly granted Merlos' Rule 12(b)(6) motion. *Id.*; *cf.* Greenway v. Greenway, 693 S.W.2d 600, 602 (Tex. Ct. App. 1985) (reversing lower court's dismissal of alienation of affections claim pursuant to motion for summary judgement).

[68] *Overstreet*, 570 So. 2d at 1198. Overstreet's civil tort claims operated independently of his legal actions with his wife because Merlos was a third party to the divorce. *Id.*; *see also* Brown v. Vogt, 538 P.2d 362, 365 (Or. 1975) (holding that parties' conduct after plaintiff's divorce was admissible in alienation of affections action).

affections in Mississippi.[69] The court reversed the lower court's dismissal of the appellant's suit.[70]

The Mississippi Supreme Court solidified the essential elements of alienation of affections in *Saunders v. Alford.*[71] *Saunders* abolished the tort of criminal conversation in Mississippi,[72] but reaffirmed the validity of alienation of affections.[73] Because the appeal did not concern the appellant's alienation of affections verdict in the lower court,[74] the court did not review the lower court's treatment of the appellee's alienation of affections claim.[75] Since the court abolished criminal conversation on appeal, the appellee effectively failed to recover any damages from the appellant.[76] However, the court definitively stated the elements of a properly pleaded alienation of affections claim in Mississippi: "(1) wrongful conduct of the defendant; (2) loss of affection or consortium; and (3) causal connection between such conduct and loss."[77]

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[69] *Overstreet*, 570 So. 2d at 1198. The appellee argued that the action was "antiquated." *Id.* One commentator presented four justifications for abolition of alienation of affections: the possibility of abuse by unscrupulous plaintiffs because of the sensitive nature of the tort and the stigma that it attached to a defendant; the lack of "deterrent force" for promoting stronger marital relationships; the difficulty of substantiating causation lended itself to jury decisions founded upon morals and not evidence; and the genesis of the tort was antiquated since it reflected spouses' property rights in one another and did not reflect modern views of husbands and wives. Leonard, *supra* note 10, at 1323-24. Another commentator reasoned that the "threats of blackmail employed to force excessive out-of-court settlements, excessive verdicts, and unfounded actions" justified eliminating alienation of affections. Kavanagh, *supra* note 13, at 330. A third argument that supported abolition suggested that any tort that provided "compensatory and possibly punitive damages from a third party for the voluntary conduct of one's marital partner seems contrary to any reasonable sense of justice or fair play." Leeper, *supra* note 10, at 601. A final argument advocated the abolition of alienation of affections since it "adds to the arsenal of weapons [spouses] can use to engage in postmarital warfare." Davidson, *supra* note 13, at 660.

[70] *Overstreet*, 570 So. 2d at 1198. The court stated that alienation of affections was a viable tort in Mississippi and, thus, precedent bound the lower court. *Id.*; *see* Camp v. Roberts, 462 So. 2d 726, 727 (Miss. 1985) (holding alienation of affections was viable tort in Mississippi).

[71] 607 So. 2d 1214 (Miss. 1992).

[72] *Saunders*, 607 So. 2d at 1219. The court reviewed other jurisdictions' treatment of criminal conversation. *Id.* at 1216-18. The court concluded that criminal conversation had "outlived its usefulness." *Id.* at 1219. The court listed 32 states as having abolished criminal conversation by legislative initiative or judicial decree. *Id.* at 1216 nn.4-5.

[73] *Id.* at 1218. The court reviewed several Mississippi decisions before reaching its conclusion. *Id.* Many jurisdictions have considered alienation of affections antiquated and unnecessary. Kavanagh, *supra* note 13, at 330. The court noted that 23 states had abolished alienation of affections by legislative enactment or judicial decree. *Saunders*, 607 So. 2d at 1215-16 nn.1-2. Six state legislatures limited the tort to injunctive relief only and allowed no monetary damages. *Id.* at 1216 n.3.

[74] *Saunders*, 607 So. 2d at 1215. The appellant was Charles David Saunders. *Id.* The appellee was Jeffy Roberts. *Id.* Saunders conducted an affair with Alford's wife for more than 20 years. *Id.* This affair included sexual relations. *Id.*

In the instant case, since no direct evidence of sexual, amorous, or affectionate contact existed between the appellant and the appellee's ex-husband,[78] the Mississippi Supreme Court permitted the appellee to create an inference of the appellant's intentional interference with the appellee's marriage.[79] The court determined that the appellee substantiated the inference of the appellant's alienation of the appellee's spouse's affections because the appellee proved the appellant's financial and emotional support of the appellee's ex-husband without her consent.[80] Since the evidence presented by the appellee was specific and persuasive, the court concluded that the jury was justified in finding that the appellant directly and intentionally alienated the affections of the appellee's ex-husband .[81] Because the court concluded an inference substantiated the appellee's claim for alienation of affections, the court effectively reduced the plaintiff's evidentiary standard from the direct evidence standard articulated in previous Mississippi decisions.[82]

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[75] *Id.* at 1218. However, the Mississippi Supreme Court compared the tort of alienation of affections to the tort of criminal conversation. *Id.* The court concluded that the tort of alienation of affections was "better suited as a deterrent [for] protecting the marital relation" than the tort of criminal conversation. *Id.*

[76] *Id.* at 1219. The jury returned a verdict in Saunder's favor on Alford's alienation of affection claim. *Id.* at 1215. Alford did not appeal this portion of the jury's verdict. *Id.* However, the jury returned a $27,500 verdict in Alford's favor on the criminal conversation charge, but the court's abolition of criminal conversation eliminated his monetary compensation. *Id.* at 1219.

[77] *Id.* at 1215. The court proceeded through a review of the purposes and common law of alienation of affections in Mississippi. *Id.* The court compiled these elements from the common law of other jurisdictions. *Id.* at 1215; *see* Giltner v. Stark, 219 N.W.2d 700, 704 (Iowa 1974) (stating that "essential elements of a cause of action for alienation of affections are wrongful conduct of defendant, loss of affection or consortium and causal connection between such conduct and loss"); Hunt v. Hunt, 309 N.W.2d 818, 820 (S.D. 1981) (noting that "essential elements of alienation of affections cause of action are: (1) wrongful conduct of the defendant; (2) loss of affection or consortium; and (3) a causal connection between such conduct and loss"); Schneider v. Mistele, 158 N.W.2d 383, 384 (Wis. 1968) (noting necessary elements of alienation of affections were "(1) wrongful conduct on the part of the defendant, (2) plaintiff's loss of affection or consortium of the spouse, (3) causal connection between such conduct and such loss").

[78] Kirk v. Koch, 607 So. 2d 1220, 1222 (Miss. 1992). Koch hired a private investigator to observe Kirk and Jeffries. *Kirk*, 607 So. 2d at 1221. The private investigator and one of his employees observed Jeffries at the Kirk home, but did not witness any affectionate gestures between them. *Id.* Furthermore, Jeffries' daughter who lived with Kirk corroborated the private investigator's report in her testimony. *Id.* at 1222.

[79] *Id.* at 1223. The Mississippi Supreme Court decided that when the parties present conflicting evidence and testimony the decision was for the jury and not the

The *Kirk* holding adds another subjective element to an innately ambiguous tort.[83] While the evidentiary requirements for alienation of affections were specific and comprehensible prior to *Kirk*, the Mississippi Supreme Court relaxed the evidentiary requirements by permitting an inference of direct interference to substantiate a plaintiff's alienation claim.[84] By confirming the viability of alienation of affections in *Kirk*, the Mississippi Supreme Court breathed new life into a tort suffocating from numerous abolitions and restrictions in other

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court. *Id.* The court stated that the jury was presented with "conflicting facts" that were resolved in favor of Koch. *Id.*

[80] *Id.* at 1222. To prove her allegation of Kirk and Jeffries' improper relationship, Koch introduced the number of checks and amount of money Kirk had given Jeffries; Kirk's payment of Jeffries' medical bills; Jeffries' residence in the Kirk home for six weeks; Jeffries' daughter by a former marriage's residence in the Kirk home for at least one year at the time of trial; Kirk's provision of a vehicle for Jeffries' use without renumeration; and Kirk's payment of Jeffries' legal fees from his divorce. *Id.*

[81] *Id.* at 1223. The Mississippi Supreme Court affirmed the trial court's decision on all counts. *Id.* at 1224.

[82] *Id.* at 1222. Sixty years prior to *Kirk*, the *Stanton* court decided that a plaintiff in an alienation of affections action had to prove the defendant's "wrongful act" to satisfy his burden of proof. Stanton v. Cox, 139 So. 458, 460-61 (Miss. 1932). In *Saunders*, a case decided the same day as *Kirk*, the court articulated the three requisite elements for an alienation cause of action: "(1) wrongful conduct of the defendant; (2) loss of affection or consortium; and (3) causal connection between such conduct and loss." Saunders v. Alford, 607 So. 2d 1214, 1215 (Miss. 1992).

[83] *See supra* notes 10, 11, 13, 57, 82 and accompanying text.

[84] *See supra* note 82 and accompanying text.

jurisdictions.[85] However, the Mississippi Supreme Court should abolish this tort which other states consider pernicious and antiquated.[86] First, damages in alienation of affections suits are ethereal since they generally consist of "mental anguish, embarrassment, disgrace, humiliation, and loss of social position."[87] The Mississippi Supreme Court will inevitably find the determination of damages increasingly difficult.[88] Next, because the causation requirement is malleable, juries could be faced with the dilemma of determining whether an inference actually substantiates the alienation or whether to just punish a culpable defendant.[89] Furthermore, since alienation of affections is an intentional tort, proof should expose the actor's willful actions with direct evidence not inferential evidence before a jury finds the actor guilty.[90] The court's holding could permit vindictive plaintiffs to utilize the shame and humiliation that an alienation of affections suit attaches to a defendant to harass innocent parties.[91] Finally, the Mississippi Supreme Court should one day acknowledge the tort's origin as a recognition of the property rights one spouse owned in the other.[92] In conclusion, the changing societal views of marriage, the subjective elements inherent in the action, plaintiffs' possible abuse of the action, and the complication of the evidentiary requirements should combine to spur Mississippi to join the majority of her sister states and abolish the tort of alienation of affections.[93]

Phillip Sykes

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[85] *See supra* note 73 and accompanying text.

[86] *See supra* notes 69, 73 and accompanying text.

[87] *See supra* note 57 and accompanying text.

[88] *See supra* note 57 and accompanying text.

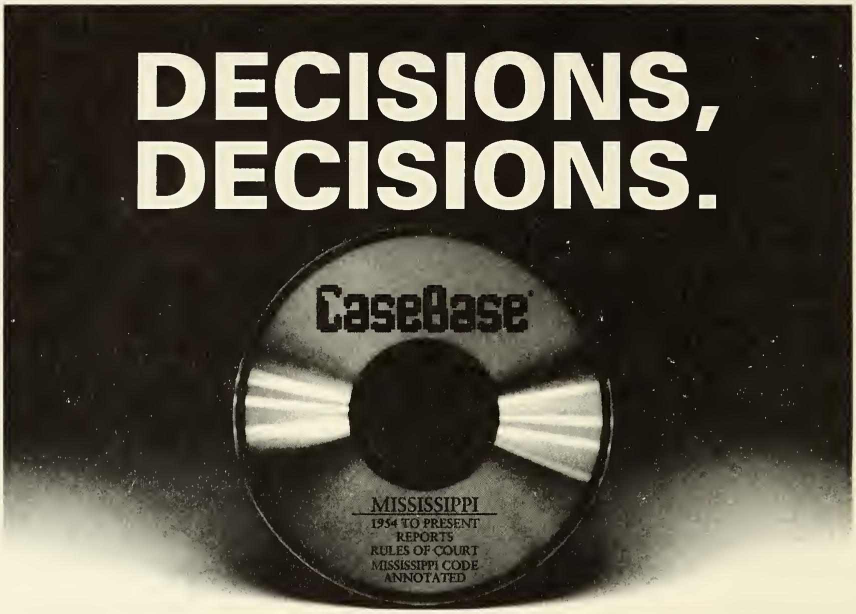
[89] *See supra* notes 57, 69 and accompanying text.

[90] *See supra* notes 13, 57, 69, 81, 82 and accompanying text.

[91] *See supra* notes 57, 69 and accompanying text.

[92] *See supra* notes 10, 11 and accompanying text.

[93] *See supra* notes 10, 13, 57, 69, 73 and accompanying text.



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